Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

BRUCE A. PELKEY,

Petitioner,

v.

THE SUPREME COURT OF ARIZONA,

Respondent.

On Petition For Writ of Certiorari To The Supreme Court Of Arizona

PETITION FOR WRIT OF CERTIORARI

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Petitioner

QUESTIONS PRESENTED

I.

Do summary regulatory schemes by states that deprive multi-jurisdictional attorneys of the right to practice law without a hearing violate the attorneys' rights to due process and equal protection under Amendment XIV, § 1 of the United States Constitution?

II.

Does a disciplinary scheme that fails to apply the criteria of *Selling v. Radford*, 243 U.S. 46 (1917), violate an attorney's right to due process?

III.

Does a court violate an attorney's rights to due process and equal protection in reciprocal discipline proceedings under *Selling v. Radford* and its progeny by refusing to review the record and conduct a hearing to consider due process violations by a sister state, and by summarily refusing to follow its own disciplinary rules and decisional law?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Neither the Judgment and Order of the Supreme Court of Arizona (Respondent) filed on September 23, 2009, reproduced in Appendix A at App. 1-2, nor its order denying Petitioner's Motion to Amend and Request for Stay of that Order, filed October 22, 2009, reproduced in Appendix C at App. 48, are published orders. The June 25, 2009 report of the Disciplinary Commission of the Supreme Court of Arizona, reproduced in Appendix B at App. 3-47, is not a published order. The original decision by the District of Columbia Court of Appeals, filed December 23, 2008 and reproduced in Appendix B at App. 9-47, is a published opinion, *In re Pelkey*, 962 A.2d 268 (D.C. 2008). The May 9, 2003 decision by Arizona State Bar counsel, reproduced in Appendix D at App. 49-50, is not a published decision.

JURISDICTION

Petitioner seeks review of the final Judgment and Order by Respondent filed September 23, 2009. Respondent's denial of Petitioner's Motion to Amend and for Stay, seeking time to file a motion for

reconsideration, was dated October 22, 2009. Jurisdiction rests with this Court under 28 U.S.C. § 1257(a) (2009).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provision is U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves a challenge to the disciplinary schemes of states that do not protect attorneys' rights to due process and equal protection under the Fourteenth Amendment, when such rights are protected by the disciplinary schemes and decisions of other states and by the federal judicial system. The case also involves the application of this Court's decision in *Selling v. Radford,* 243 U.S. 46 (1917) and its progeny to state-to-state reciprocal discipline. The following facts are material to consideration of the questions presented. [1]

Petitioner was admitted to the State Bar of Arizona in 1982 and to the District of Columbia Bar in 1995, and had a spotless record until these proceedings. However, as a result, he is now a former attorney, law professor, international lecturer and consultant on the rule of law, privatization and the development of market economies.

Between 1991 and 1998 he formed several small consulting companies to facilitate different aspects of his collaborations with other independent consultants. The bar complainant, Ms. Cavalli, worked with three of Petitioner's consulting

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[1] Additional facts and procedural history are provided in the legal arguments which follow.

companies from 1996 to 1998 on a fee-for-project basis and was paid fees. A dispute arose in mid-1999 regarding the return of funds invested by two of Petitioner's companies, CGI and TPIC, through Ms. Cavalli. She ultimately claimed it was her understanding, based on what she later termed were "evolving" discussions, that she was to become a partner in one, or possibly more, of Petitioner's companies, and retained the invested funds.

After several months of fruitless communications, including Petitioner's offers to escrow the invested funds until whatever claims Ms. Cavalli felt she had could be resolved, she filed what she called a "defensive" lawsuit against Petitioner in the District of Columbia for some $22 million. After that case was dismissed, CGI, TPIC and Petitioner sued Ms. Cavalli and others in California, where they were resident by this time, for the return of the invested funds and damages. Following reinstatement of the D.C. litigation, both cases were stayed pending the outcome of private mediation and arbitration.

Three years later, in order to force a settlement, Ms. Cavalli filed the same "urgent" bar complaint in Arizona and in D.C., where Petitioner had not practiced and was on inactive status. She alleged an attorney/client relationship had existed some six years earlier. The Arizona State Bar conducted a mandatory review, decided further investigation was

unwarranted, and dismissed the matter. (App. 49-50)

The D.C. bar waited over two years, until March 1995, to file charges, knowing Petitioner was in the midst of two appeals in the underlying litigation. Petitioner raised the due process concerns and factual errors addressed in Section III *post* in the D.C. proceedings. On December 23, 2008, The D.C. Court of Appeals found it was "intended" that Ms. Cavalli was to be a partner with Petitioner in various "ventures", found Petitioner had committed theft and other disciplinary rule violations and disbarred him. (App. 9-47) Petitioner filed a motion for rehearing, which was denied.

The Arizona Disciplinary Commission then issued an order to Petitioner and state bar counsel under Rule 53(i)(2), ARIZ. R. SUP. CT., [2] directing them to provide reasons why Arizona should not impose the same discipline. *See* (App. 53-54) Both filed responses, with Petitioner filing detailed statements of facts and arguments, and a comprehensive record in support. Petitioner based his arguments on the procedural due process considerations discussed in *In re Ruffalo*, 394 U.S. 544 (1968) and its progeny, the review criteria enumerated in

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[2] All references are to the Rules of the Arizona Supreme Court unless otherwise indicated.

Selling v. Radford and on Arizona and D.C. law addressing the due process issues involved. After bar counsel filed a reply, the Commission sent a notice of executive session "pursuant to Rule 53(i)" for June 13, 2009; **Petitioner was informed he could not attend.** The Commission issued its report on June 25, making no findings of fact or conclusions of law and apparently no review of the record. It summarily recommended imposing reciprocal discipline and incorporated by reference the District of Columbia Court of Appeals Opinion and Order. (App. 3-47)

Review of a Commission recommendation is discretionary, and the court will not consider the record, which remains lodged with the Disciplinary Clerk, unless review is granted. Rule 59(g) and (h). (App. 67) Petitioner timely filed a Petition for Review dated July 21, 2009, raising and discussing the constitutional issues of due process and equal protection under the U.S. Constitution, the Fourteenth Amendment § 1 and the Arizona Constitution art. 2, §§ 4 and 13. He asked the court to construe its disciplinary rules in light of the constitutional issues involved. The Petition also discussed the *Ruffalo* due process cases, the *Selling* criteria and addressed the due process violations in the D.C. proceedings, as briefly discussed *post*.

Using form language, the Arizona Supreme Court denied review, making no findings of fact and no reference to Petitioner's arguments or to the record, and specifically not ruling on the federal questions raised. Its Judgment and Order of September 23, 2009 (App. 1-2) states, in pertinent part:

> This matter having come on for hearing before the Disciplinary Commission of the Supreme Court of Arizona, it having duly rendered its decision, and this Court having considered Respondent's Petition for Review and the response of the State Bar, accordingly
>
> IT IS ORDERED that the Petition for Review is denied.

The court next refused to grant Petitioner's timely motion to amend its order, which erroneously indicated Petitioner had received a hearing before the Commission. [3] Further, Respondent refused to grant Petitioner time in which to file a motion for reconsideration, which is only by permission, in

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[3] "A hearing ordinarily is defined, in matters not associated with full trials, as a proceeding in which the parties are afforded an opportunity to adduce proof and to argue (in person or by counsel) as to the inferences flowing from the evidence." *Anderson v. Alabama*, 999 So.2d 575, 578 (Ala. 2008).

order to brief more fully the constitutional and other issues involved. [4] Finally, Respondent refused to stay the immediate implementation of its order, which normally does not become effective for 30 days under Rule 72(d). Petitioner had sought a stay in the alternative in order to seek review by this Court. Respondent's October 22 denial reads: "On October 5, 2009, respondent filed a Motion to Amend and Request for Stay of Judgment and Order. Upon consideration, IT IS ORDERED denying the motion to amend and request for stay." (App. 48) The Judgment and Order are now final.

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[4] Petitions for review, which must contain a synopsis of the Commission decision, a statement of issues, a statement of facts and the legal arguments, are limited to 20 pages. Rule 59(d). (App. 66-67)

REASONS FOR GRANTING THE PETITION

This case presents what appears to be a matter of first impression – the application of constitutional protections and of this Court's decisions to state-to-state reciprocal discipline schemes. This is a matter of increasing importance, as the number of attorneys with a multi-jurisdictional practice increases year by year, as does the number of states adopting rules permitting such practice. Certiorari should be granted to resolve the conflicts that currently exist between the highest state courts and to bring uniformity to the issue of reciprocal discipline of attorneys among the states.

Further, conflicts exist between the rules and decisions of the highest courts of the states and those of the United States courts of appeals and this Court. Certiorari should be granted to resolve these conflicts, and to bring uniformity between the states and the federal courts.

Finally, the Court should determine if the *Selling v. Radford* criteria are applicable to the states' licensing and regulatory bodies, and to the states' highest courts, and the method by which they should be applied to ensure constitutional protections to attorneys subject to reciprocal discipline. SUP. CT. R. 10(b) and (c).

I. Summary regulatory schemes by states that deprive attorneys of the right to practice law without a hearing violate the attorneys' rights to due process and equal protection under the Fourteenth Amendment.

The practice of law is a right and not a matter of grace. *Baird v. State Bar of Arizona*, 401 U.S. 1, 8 (1971). "[T]he opportunity to practice law should be considered a 'fundamental right.'" *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985). The protection of such right is guaranteed by the Due Process and Equal Protection Clauses of § 1 of the Fourteenth Amendment. [5] *See Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957).

A. The Fourteenth Amendment offers due process protection by requiring a hearing before the deprivation of such right.

Due process comes into play where the State attaches "a badge of infamy" to the citizen.

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[5] The same rights are protected by the Arizona Constitution, art. 2, §4 (due process) and art. 2, §13 (equal protection).

Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (citation omitted). Further, "The right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society." *Id.*

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential . . . . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

Id. at 437.

"At the very least, due process requires that the relevant state decisionmaker *listen* to the claimant and then *apply the relevant criteria* in reaching his decision. The failure to observe these minimal procedural safeguards creates an unacceptable risk of arbitrary and 'erroneous deprivation[s]'. . . ." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 792 (2005) (Stevens, J., dissenting) (footnote and citation omitted).

This Court has repeatedly recognized that due process must be afforded to a license holder before being denied, or deprived of, a license. In *Willner v. Committee on Character and Fitness*, 373 U.S. 96

(1963), the Court addressed the due process deprivation resulting from a procedure whereby a bar applicant was denied a hearing.

> Those who are brought into contest with . . . Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command . . . . "[T]he requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

Id. at 105 (citation omitted). The Court addressed the suspension of a driver's license in *Bell v. Burson*, 402 U.S. 535, 539 (1971):

> Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses . . . involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

In *Barry v. Barchi*, 443 U.S. 55, 66 (1979), the Court held the suspension of a horse trainer's license for 30 days before providing the licensee with a full hearing was "constitutionally infirm" under the Due Process Clause.

Attorney disciplinary proceedings are adversarial and quasi-criminal in nature. Due process requires fair notice of the charges and an opportunity to provide an explanation and present a defense. *Ruffalo*, 390 U.S. at 550-51 (citations omitted). *Accord, Irving v. Statewide Grievance Committee*, 900 A.2d 77, 81 (Conn. 2006): "'Procedural due process is a required constitutional right adhering to those attorneys who are subject to disciplinary action so that they are not unjustly deprived of their reputations or livelihoods.'" (citation omitted).

States other than Arizona provide an opportunity for a hearing in reciprocal discipline cases, as shown by a review of all of the states in the Ninth Circuit, together with Connecticut, Florida, Massachusetts, Michigan, Nebraska, New York, Ohio, Pennsylvania, South Dakota, Texas, Virginia and D.C. (App. 68-72) The procedures vary, with some providing for a hearing before the highest court; others provide for a mandatory review of the record by that court, applying the *Selling v. Radford* standards, if the attorney has already been afforded a hearing within

that state's disciplinary process. [6] Of these states, only Arizona denies both a mandatory review of the record and a hearing.

New York will not impose reciprocal discipline without an opportunity for a hearing when the attorney has filed a verified statement alleging the *Selling* criteria. (N.Y. COMP. CODES R. & REG. tit. 22, §603.3(b) (2009)). Under California's Rules of Practice of the California State Bar Court (2009), Rule 1330 provides for oral argument before the court's Review Department. [7] The South Dakota Supreme Court refused to summarily impose reciprocal discipline in *In re Reciprocal Discipline of Rokahr*, 681 N.W.2d 100 (S.D. 2004), stating:

> It has been repeatedly held in this state that the revocation of a license of a professional [person] carries with it dire consequences. It not only involves necessarily disgrace and humiliation, but it means the end of [her] professional career. In a proceeding so serious, due process of law requires a definite charge, adequate notice and a full, fair and impartial hearing.

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[6] The *Selling v. Radford* standards are discussed *post*.

[7] Rule 1330 is made applicable to reciprocal proceedings by the Rules of Procedure of the State Bar (2009), Rule 625(b).

Id. at 108 (alteration in original).

In *Nebraska ex rel. Neb. State Bar Ass'n. v. Dineen*, 455 N.W.2d 178, 180 (Neb. 1990), the Supreme Court of Nebraska granted the attorney a hearing: "Although respondent had the opportunity to be heard in the [first] disbarment proceeding, that does not satisfy his right to be heard regarding disbarment in Nebraska." *Accord, Florida Bar v. Wilkes*, 179 So.2d 193, 197-200 (Fla. 1965) (court and its agencies must fully inform themselves through proceedings providing for submission of evidence, an independent appraisal by a hearing referee, and review by the bar board and by the court, applying the *Selling* criteria, before imposing reciprocal discipline).

The same principles apply in the federal courts. SUP. CT. R. 8.2 provides for a hearing when material facts are in dispute. [8] *See also* FED. R. APP. P. 46(c) (opportunity for hearing if requested); 9TH CIR. R. 46-2(d) and (e) (same); and *In re Thies*, 662 F.2d 771,

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[8] It is incorrect to say that material facts are "in dispute" here. The D.C. court made findings of fact that are directly contradicted by Ms. Cavalli's testimony and the record documents. This infirmity of proof was demonstrated in the D.C. proceedings, in Petitioner's Response to the Disciplinary Commission and again in his Petition for Review. Selected examples are discussed briefly in Section III *post*.

773-74 (D.C. Cir. 1980) (disbarment reversed where second court conducted hearing but failed to ensure due process was satisfied in first proceeding, placing exclusive reliance on first disbarment).

"Certainly lawyers and courts should be particularly sensitive of, and have a special obligation to respect, the demands of due process." *Willner*, 373 U.S. at 106 (Goldberg, J., concurring). Petitioner was denied due process by the Arizona Supreme Court when he was denied a hearing before being deprived of his bar license.

B. The Equal Protection Clause also applies to protect the attorney's rights.

The Arizona scheme also deprives attorneys of equal protection under § 1 of the Fourteenth Amendment. The validity of the denial of a property right, or a differentiation in treatment, can be tested under both the Due Process and Equal Protection Clauses. *Boddie v. Connecticut*, 401 U.S. 371, 388 (1971) (Brennan, J., concurring). *See also Bolling v. Sharpe*, 347 U.S. 497, 498 (1954): "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive."

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (citation omitted). "[T]he right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." *Boddie,* 401 U.S. at 379-80.

As noted, the Arizona scheme of reciprocal discipline conflicts with those of other states, which provide the attorney a mandatory review of the record evidence and a hearing at some stage in the proceedings. In addition, Rule 58(d)(3) (App. 62) provides attorneys subject to original discipline the right to request oral argument before the Disciplinary Commission; reciprocal discipline attorneys are not afforded that right under Rule 53(i). (App. 52-55) Such conflicts and distinctions violate the Equal Protection Clause.

Attorney discipline is designed to protect the public, *Ruffalo*, 390 U.S. at 550, "[t]he legal profession, and the legal system and to deter other attorneys from engaging in unprofessional conduct." *In re Van Dox,* 152 P.3d 1183, 1186 (Ariz. 2007).

"Additionally, we view discipline as assisting, if possible, in the rehabilitation of an errant lawyer. . . . The object of disciplinary proceedings is not to punish." *In re Scholl,* 25 P.3d 710, 224 (Ariz. 2001) (citation omitted).

Both "original" and "reciprocal" attorneys face the same types of discipline in Arizona, ranging from informal reprimand to disbarment. However, one group has the opportunity to present their arguments in explanation and defense, while the other does not. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational", applying the rational basis standard of review. *Cleburne,* 473 U.S. at 446. However, compare *Cleburne* with *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 457 (1988), where the Court stated a statute that interferes with a "fundamental right" provokes strict judicial scrutiny, in light of *Piper,* 470 U.S. at 281: "[T]he opportunity to practice law should be considered a 'fundamental right'."

Although Arizona has admirable goals, the distinction in classifications under the Arizona rules is arbitrary and irrational, and offends the Equal Protection Clause, as it rests on grounds that are "wholly irrelevant to the achievement of the State's objective." *Kadrmas,* at 462. The present

disciplinary scheme serves neither a compelling, important, nor legitimate state interest nor objective. Regardless of the level of review applied, attorneys subject to reciprocal discipline have no other means of redress but to submit to the judicially created scheme. *See Kadrmas,* 487 U.S. at 460-61. *See also In re Hoover,* 745 P.2d 939, 942 (Ariz. 1987) (Arizona Supreme Court may not disregard the Constitution, "leaving a respondent with no avenue for redress and no means to be heard.")

The Arizona scheme violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Certiorari should be granted to bring uniformity of treatment among the states, and between the states and the federal courts, to resolve the conflict that exists between the Arizona procedures and those of other courts and to ensure the protection of constitutional rights in state disciplinary schemes.

II. The Court should determine if the criteria announced in *Selling v. Radford* are applicable to the states' licensing bodies and highest courts and, if so, whether a failure by such body to apply the *Selling* principles violates an attorney's right to due process in disciplinary proceedings.

The seminal reciprocal discipline case for the federal courts is *Selling v. Radford,* 243 U.S. 46. *Selling* involved a determination by this Court whether to impose reciprocal discipline based on a state court disbarment. The Court began by noting the character and scope of its investigation must depend on the character of the acts of misconduct and wrong relied on, the place of commission and the nature of proof relied on to establish their existence. *Id.* at 48-49. The Court set certain criteria to be followed while conducting such investigation during an intrinsic consideration of the state court record.

> 1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as

> final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do.

Id. at 51.

However, this decision has been applied in different ways. For example, *Selling* has been followed by this Court in *Ruffalo*, 390 U.S. at 550, and *Theard v. United States*, 354 U.S. 278, 282 (1957), among others. It has also been applied by virtually every circuit court, sometimes by following a mechanistic approach, while others take the principles to heart. *See, e.g., Thies,* where the Tax Court had disbarred an attorney based exclusively on disbarment by a state court. The appellate court recognized the second court must do more than merely make a "bare statement that the *Selling v. Radford* criteria were satisfied." *Id.*, 662 F.2d at 773. The court then conducted its own *Selling* analysis and concluded: "We find no evidence that the Tax Court relied on anything other than the state disbarment . . . ." and vacated the Tax Court disbarment. *Id.* at 773-74 & n.16.

The methods by which the *Selling* standards have been applied by the state courts also vary – *see, e.g., Wilkes,* 179 So.2d at 198 (apply *Selling* standards in conjunction with an evidentiary hearing, but differing with this Court as to the binding effect of the first discipline); *Dineen,* 455 N.W.2d at 180 (supreme court applies *Selling* standards in conjunction with a hearing); and the states listed in App. F. Of those states, the Supreme Court of Arizona clearly does not apply the *Selling* standards.

Certain principles emerge from *Selling* and its progeny. First, "Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred." *Theard,* 354 U.S. at 282. Further, the second court is "obligated to determine for itself the facts of the attorney's conduct and whether that conduct had been so grievous as to require disbarment." *Ruffalo,* 390 U.S. at 553 (White, J., joined by Marshall, J., concurring). "In doing this all available sources which can be properly utilized should be considered, including all evidence properly offered in the [second] proceeding and the record of proceedings in the sister state." *Wilkes,* 179 So.2d at 197.

In addition, the second court must do more than merely find that the *Selling* criteria have been satisfied. (*Thies*). The second court should not

disbar if reasonable attorneys would differ in appraising the propriety of the conduct. *Ruffalo*, 390 U.S. at 556. Finally, and perhaps most important, the second court must recognize its duty not to disbar except upon the conviction that, under the principles of right and justice, it is constrained to do so. *Selling*, 243 U.S. at 51.

Fairness of procedure is "due process in the primary sense." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring). Here, the Arizona Supreme Court applied none of the principles set forth above; made no examination of the record; conducted no hearings; made no findings; and chose to rest completely on the decision by the D.C. court. This violated due process "in the primary sense".

Certiorari should be granted, as this Court has never squarely decided that the principles and criteria outlined above should be applied by all state and federal courts when considering discipline imposed by a sister state, or between the states and the federal judiciary, or whether the failure to apply such principles results in a deprivation of due process. Uniformity of approach is needed to assure the rights of attorneys subjected to reciprocal discipline are protected in both proceedings.

The examples discussed next illustrate why a *Selling* analysis should include an examination of due process violations by the first jurisdiction, as well as whether such acts would violate the second state's disciplinary rules and decisional law, and the application of those rules and laws in reciprocal discipline cases to protect the rights to due process and equal protection of the attorney.

III. A court violates due process and equal protection under *Selling v. Radford* and its progeny when it refuses to review the record and conduct a hearing to consider due process violations in the first state's proceedings, and by summarily refusing to follow its own disciplinary rules and decisional law.

"When a court undertakes to sanction an attorney for violating court rules, it is incumbent upon the sanctioning court to observe scrupulously its own rules of disciplinary procedure . . . . A court cannot ignore and circumvent its rules at will to the detriment of those covered by them." *In re Thalheim,* 853 F.2d 383, 390 (5th Cir. 1988) (per curiam). The record is replete with instances where the D.C. court violated its own rules and decisional law and ignored or contradicted the record evidence,

without explanation. Such acts violated Petitioner's rights to due process.

By its wholesale adoption of the D.C. decision without giving Petitioner a hearing to show how the D.C. court erred, and by failing to evaluate the D.C. decision by applying the principles of *Selling* and its progeny, taking into consideration its own disciplinary rules and decisions, Respondent likewise violated Petitioner's rights to due process and equal protection.

A. An administrative agency decision has preclusive effect on disciplinary proceedings in Arizona, under the doctrine of administrative res judicata.

Respondent, in disciplining Petitioner, ignored the final decision of its own state bar, and its own case law. Ms. Cavalli filed the *identical* bar complaint in both Arizona and D.C. [9] Under ARIZ. R. SUP. CT., Rule 51(b)(1), bar counsel is required to conduct an investigation and determine if the information provided by the complainant alleges

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[9] Her D.C. complaint referenced Petitioner's *Arizona* bar membership, but *not* his membership in the D.C. bar. Petitioner pointed this out in the D.C. proceedings; he was ignored.

facts which, if true, would be grounds for discipline. (App. 51)

Under Rule 54(a), an original proceeding commenced by bar counsel shall be either: dismissed; stayed; or result in sanctions. (App. 55-56) Under Rules 51(b)(5) and 54(b)(1)(B), bar counsel shall close the matter if it determines there is no probable cause to believe misconduct exists. (App. 51-52, 56) That is precisely what happened here: Arizona bar counsel conducted an investigation of Ms. Cavalli's complaint in 2003, found no probable cause, dismissed the matter and so informed Petitioner. (App. 49-50) Respondent's action of later summarily disbarring Petitioner violates the doctrine of administrative res judicata.

In Arizona, "Res judicata is usually referred to as a rule preventing relitigation of the same cause of action." *Yavapai County v. Wilkinson*, 534 P.2d 735, 736 (Ariz. 1975) (en banc). "Res judicata generally applies to valid and final adjudicative determinations by administrative tribunals." *Better Homes Const., Inc. v. Goldwater*, 53 P.3d 1139, 1142 (Ariz. Ct. App. 2002). "When an administrative tribunal has statutory authority to make a final determination, such determination will be conclusive in the absence of an appeal." *Casillas v. Arizona Dep't. of Econ. Security*, 739 P.2d 800, 802 (Ariz. Ct. App. 1986).

Under the express language of Rules 51 and 54, bar counsel was given jurisdiction and authority by Respondent to decide whether probable cause existed and whether to institute a formal complaint; its decision was final. The original complaint involved the same claims and parties present here, as Respondent was in privity with its Disciplinary Commission and bar counsel. All parties were bound by bar counsel's decision to dismiss the proceedings.

Respondent has decided a case virtually on all fours, in which it forbade the action it took here. In *In re an Anonymous Member of the State Bar of Arizona,* 624 P.2d 1286 (Ariz. 1981), a local administrative committee conducted an investigation, found no probable cause and dismissed the complaint. [10] The Disciplinary Board (now the Disciplinary Commission) disagreed, and referred the complaint to a different committee, which instituted a formal complaint. *Id.* at 1287-88. Respondent found nothing in the rules that permitted anything other than to accept the results of the first investigation and dismissed the case. *Id.* at 1288.

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[10] The administrative committees previously performed the investigatory functions now performed by bar counsel, and have been described as acting as a "quasi-judicial body". *See In re Ireland,* 706 P.2d 352, 359 (Ariz. 1985) (per curiam).

Other jurisdictions have followed suit, based on due process. In *Thalheim*, the court dismissed a reciprocal proceeding, finding the operative rules did not permit the lower court to ignore an investigatory panel recommendation against imposing the state court discipline and that such action violated due process. *Id.* 853 F.2d at 385-88. In *Rokahr*, the state supreme court decided, applying due process principles, its laws contained no provision providing for later reciprocal discipline after its disciplinary board had earlier investigated and admonished the attorney on the same complaint then pending in a sister state. *Id.* 681 N.W.2d at 105-09.

The Arizona Supreme Court's rules make no provision for a "second look" at the same complaint through the use of its reciprocal discipline mechanism. As in *Thalheim*, Respondent wrote its own rules; it must abide by them. It violated its own case law and the application of administrative res judicata by ignoring bar counsel's dismissal. Respondent was thereafter prejudicially influenced by the D.C. decision, which led to an erroneous result. Implementing a procedure to impose discipline where one does not exist deprived Petitioner of his rights to both due process and equal protection.

B. Petitioner was denied due process by the failure of the courts of both the District of Columbia and Arizona to follow their disciplinary rules as to choice of law principles before considering whether to impose discipline.

Petitioner was initially charged with violating thirteen Rules of the D.C. Rules of Professional Conduct; six were dismissed and six of the remainder dealt with his alleged conduct in the California litigation. The disciplinary rules of both D.C. and Arizona contain choice of law provisions that require allegations based on conduct in a foreign jurisdiction to be charged, tried and a conclusion reached – based only on the rules of the foreign jurisdiction. Both the present D.C. Rules of Professional Conduct, Rule 8.5(b)(1) (adopted effective February 1, 2007) and ARIZ. R. SUP. CT., Rule 42, Rules of Professional Conduct, Ethical Rule 8.5(b)(1), state:

> Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied *shall be as follows*: . . . (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits,

> *unless* the rules of the tribunal provide otherwise . . . . (emphasis added). [11, 12]

Both jurisdictions have decided cases addressing this Rule. *See In re Gansler*, 889 A.2d 285, 289 n.4 (D.C. 2005) (Maryland rules would apply in an original D.C. proceeding) and *In re Iliff*, 854 P.2d 1147, 1149 (Ariz. 1993) (applying Minnesota rules). While the D.C. court acknowledged the existence of Rule 8.5, it ignored its application here. (App. 30-32) Instead, it found Petitioner violated six *D.C. rules* based on his *California* conduct (App. 36-41), where Petitioner was clearly performing "lawyer functions" in the California litigation and was recognized by that court and Ms. Cavalli's counsel as a lawyer. However, the D.C. court found no violations of the California rules (which were never charged); it also

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[11] The version of D.C. Rule 8.5(b)(1) in effect at the time of the alleged conduct stated: "For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for the purposes of that proceeding), *the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise* . . . ." (emphasis added).

[12] The California disciplinary rule in effect at the time of the conduct, Rule 1-100(D)(2) of the California Rules of Professional Conduct, stated: "As to lawyers from other jurisdictions who are not members [of the California Bar]: These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state...."

found no violations of the D.C. rules for his conduct in the D.C. litigation – which were charged but not proven. [13]

Rules of professional conduct have been held to be penal in nature, as they punish an offender, not compensate a victim. Under the rule of lenity, disciplinary rules must be strictly construed, resolving any ambiguities in favor of the accused. *In re Haley,* 126 P.3d 1262, 1274 (Wash. 2006) (Sanders, J., concurring). Both D.C. and Arizona agree they must follow their own rules, *see, e.g., Gansler* and *Hoover,* 745 P.2d at 942; yet both chose to ignore them, and the California rules. Instead, Arizona followed the lead of the D.C. court without even acknowledging the argument and disbarred Petitioner – merely because D.C. had done so.

"It takes an exquisite talent for irony for the courts to punish a rule breaker with one hand while they break their own rules with the other. Such inconsistency should not be allowed to prevail in modern-day court/lawyer interface." *In re Bird,* 353 F.3d 636, 641 (8th Cir. 2003) (Bye, J. dissenting).

A court violates procedural due process when it fails to follow its own rules. *Thalheim,* 853 F.2d at

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[13] D.C. bar counsel admitted charging D.C. rule violations in connection with the D.C. litigation in an effort to bring Petitioner under the rubric of the D.C. rules.

386. Petitioner's rights to due process were violated when the D.C. court failed to follow its own rules and again when Respondent failed to follow its own rules, apply the *Selling* criteria and refuse to impose the same discipline.

C. Petitioner was denied due process by being denied the guaranteed right to counsel in the D.C. proceedings. Respondent compounded the due process deprivation by its wholesale adoption of the D.C. decision without considering such deprivation.

The Court discussed the right to be represented by counsel in *Powell v. Alabama,* 287 U.S. 45, 68-69 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel . . . . *If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.* (emphasis added).

The same is true in disciplinary proceedings. *See State ex rel. Oklahoma Bar Ass'n. v. Albert,* 163 P.3d 527, 532 n.9 (Okla. 2007): "Fundamentals of due process . . . in disciplinary hearings contemplates a fair and open hearing before a trial panel with notice and an opportunity to present evidence and argument, representation by counsel, if desired . . . ." When the law provides for representation by counsel, a defendant should be given a fair opportunity to obtain counsel. *Powell,* 287 U.S. at 53. "[O]therwise, the right to be heard by counsel would be of little worth." *Chandler v. Fretag,* 348 U.S. 3, 10 (1954) (applying the Fourteenth Amendment).

D.C. Board on Professional Responsibility Rule XI, §8(d) provides: "[t]he attorney shall have the right to be represented by counsel" in disciplinary proceedings. [14] The Notice to Respondent served with the Petition and Specification of Charges states the same, together with the guarantee that the Board will reimburse counsel if the attorney qualifies. Petitioner acted diligently in requesting that counsel be appointed, and later in securing private counsel when the Board denied his first request. The hearing committee denied a request for a continuance filed three weeks before the hearings' scheduled start, which would have permitted

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[14] ARIZ. R. SUP. CT., Rule 57(a)(2) provides the same.

retained counsel to attend – despite having granted a similar request by bar counsel for Ms. Cavalli's convenience. The Board also waited until four days before the hearings to deny a second request for appointed counsel. Petitioner also requested a continuance at the opening of the hearings, which was again denied. Petitioner, who was primarily a transactional attorney in his Arizona practice, had not actively practiced in D.C. and was completely unfamiliar with disciplinary proceedings, was forced to represent himself. [15]

The resulting discipline should be reversed when a hearing committee refuses a request for continuance. *Burton v. Statewide Grievance Committee,* 760 A.2d 1027, 1032 (Conn. App. Ct. 2000). *Accord, Johnson v. United States,* 398 A.2d 354, 366 (D.C. 1979) (case should be reversed if error jeopardized fairness of proceeding as a whole, or had possibly substantial impact on outcome).

The summary by the *Powell* Court applies with equal force here: if in any case a court were to refuse to hear a party by counsel, such would be a denial of

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[15] A request for continuance is addressed to the sound discretion of an agency or the trial court, and will be set aside only for an abuse of discretion. However, discretion must be exercised in the interests of justice and with a view to promoting substantial justice. *Murphy v. A.A. Beiro Constr. Co.*, 679 A.2d 1039, 1043 (D.C.1996) (citations omitted).

due process – which, although it did not lead to Petitioner's imprisonment, did most surely lead to "quite serious repercussions affecting his career and his reputation." *See Argersinger v. Hamlin,* 407 U.S. 25, 36 (1972) (citation omitted). Petitioner was denied due process by being denied his right to be heard by counsel, and again when Respondent refused to review the record and address such deprivation.

D. The D.C. court violated due process by arbitrarily overruling findings of the factfinder while ignoring the contradicting record evidence and by improperly relying on inadmissible documents. Respondent violated due process when it failed to recognize such violations, and the infirmity of proof, as grounds not to impose the same discipline under *Selling*.

1. The D.C. court arbitrarily overruled findings of fact and contradicting record evidence to find a rule violation.

Petitioner was charged with violating D.C. Rules of Professional Conduct, Rule 8.4(b), as follows: "Respondent's conduct violated . . . Rule 8.4(b), in that Respondent committed criminal acts (fraud and

theft) that reflect adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects . . . ." This mere recitation of the rule violated the "fair notice" requirements of *Ruffalo,* as it gave none of the necessary particulars – not even specifying any statutes. [16] *Id.*, 390 U.S. at 550-52.

Theft in the District of Columbia is a specific intent crime and requires taking the property of another without authority or right and proof that the property had some value. *Peery v. U.S.*, 849 A.2d 999, 1001 (D.C. 2004). The wrongful intent must be present at the time of the taking. *Nowlin v. U.S.*, 782 A.2d 288, 291 (D.C. 2001). An attorney charged with theft under D.C. Rule 8.4(b) could not be found to have the necessary intent if he had a good faith belief he had a right to the funds in question. *In re Mitrano*, 952 A.2d 901, 905 (D.C. 2008).

The hearing committee in D.C. disciplinary proceedings acts as the trier of fact. *In re Gil,* 656 A.2d 303, 304 (D.C. 1995). In Arizona, the reviewing

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[16] There are several D.C. statutes dealing with theft and fraud. *See, e.g.*, § 22-3221 (addressing three types of fraud); § 22-3211(b)(1) and (2) (general theft, with two different applications); § 22-3211(c) (theft of services); § 22-3212(a) and (b) (differentiating between first degree and second degree theft and the penalties for each); and § 22-3216 (taking property without right) (all D.C. CODE ANN. (2001 Ed)).

court will not substitute its judgment for that of factfinder as to issues such as state of mind, which is a fact question. *Van Dox*, 152 P.3d at 1187. After hearing six days of testimony, the committee made findings of fact that Petitioner committed neither theft nor fraud, finding no evidence of the necessary intent. Ms. Cavalli agreed, testifying she was never concerned Petitioner was trying to "rip me off". The committee noted bar counsel made only "minimal reference" to the charge, having focused instead on proving an attorney/client relationship – which was never found. *See Ruffalo*, 390 U.S. at 551 n.4 (serious prejudice may result from content of original charges, lulling attorney into false sense of security he could rebut those charges).

Despite being bound by the findings of fact of the committee (*In re Austin*, 858 A.2d 969, 977 (D.C. 2004)), and without ruling the hearing committee's findings to be clearly erroneous, the D.C. court concluded Petitioner violated D.C. Rule 8.4(b) by committing theft under D.C. Code § 22-3211 (without specifying which subpart). [17, 18] The court

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[17] Section 22-3211(b) states: "A person commits the offense of theft if that person wrongfully obtains or uses the property of another with intent: (1) To deprive the other of a right to the property or a benefit of the property or (2) To appropriate the property to his or her own use or to the use of a third person."

did so based primarily on three findings – which were directly contradicted by the record evidence. [19] Yet the court seized on its erroneous findings as supplying all of the necessary requirements to find Ms. Cavalli was "intended" to be a partner with Petitioner in various unformed "ventures"; and from there, criminal intent; and from there, theft; and from there, disbarment.

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[18] Petitioner was never criminally charged with, nor convicted of, any crime.

[19] The court found Ms. Cavalli thought she was on the ownership papers of one of Petitioner's companies, TPIC, and didn't learn she was not until 1999. (App. 15) In fact, she testified she knew she was not listed at the time TPIC was formed in 1997 – and continued her working arrangement for nearly two more years.

A second error came in the finding that Ms. Cavalli had "invested" over $32,000 into undenominated "ventures". (App. 14) In fact, the record shows there were no such investments.

A third error concerned a February 1997 draft letter by Ms. Cavalli to her friends, and two words of editing alleged to be by Petitioner. (App. 16) Petitioner could not confirm he had made the edits; there was no evidence the letter was ever published, to anyone; and no evidence it contained all the terms of any agreement, or multiple agreements, to form the multiple "ventures" the court found. There are other issues with that document, and with several other related findings, which are beyond the scope of this Petition. These arguments and the supporting evidence were ignored in the D.C. proceedings and again by the Arizona Disciplinary Commission and court.

The problem here is the court's decision "does not merely pertain to the 'quantum of evidence' necessary to corroborate a charge . . . but is an actual *element* of the crime – a 'substantive principle of law,' [citation] the failure to establish which 'entirely precludes a [criminal] prosecution . . . .'" *See Rogers v. Tennessee*, 532 U.S. 451, 468 (2001) (Stevens, J., dissenting) (citation omitted). "If the evidence fails to prove all of the elements of [the] charge, the conviction is not supported by evidence, in which event it does not comport with due process of law." *Thompson v. City of Louisville*, 362 U.S. 199, 204 (1960).

"Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." *Id.* at 206 (footnotes omitted). *See also Schware*, 353 U.S. at 246-47 (it is a denial of due process to deny the right to practice law when evidence did not support such denial).

The D.C. court violated Petitioner's due process rights, which were again violated when Respondent ignored its own case law, disbarring Petitioner without review, analysis or comment as to the lack of record evidence upon which its disbarment was based.

2. Respondent violated Petitioner's due process rights by its wholesale adoption of the D.C. court's decision, which improperly relied both on inadmissible documents and documents not in evidence.

It is an "elementary requirement" that the decisionmaker's conclusions must rest solely on the legal rules and evidence adduced at the hearing. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). The D.C. court has consistently held that a judgment in a non-disciplinary proceeding may not be used as the basis for finding a bar disciplinary rule violation. *See In re Ditton*, 954 A.2d 986, 990-1 (D.C. 2008) and *In re Maxwell*, 798 A.2d 525, 529 (D.C. 2002) (opinions of the D.C. trial and appellate courts in earlier civil litigation inadmissible as proof of ethical violations, citing companion case of *Attorney Grievance Comm'n. of Maryland v. Bear*, 763 A.2d 175, 181 (Md. 2000)).

Arizona agrees. *See In re Peasley*, 90 P.3d 764, 772 n.14 (Ariz. 2004) (trial judge's findings in underlying case do not necessarily determine whether ethical violation occurred). "[W]here so much was at stake, [the attorney] had the due process right to hold the disciplinary authorities to the burden of proving his conduct amounted to an *ethics* violation under the higher clear and

convincing standard that applies in disciplinary proceedings." *Bird,* 353 F.3d at 641 (Bye, J. dissenting) (citation omitted; emphasis in original).

The D.C. court relied heavily on an antecedent arbitration award (authored by Ms. Cavalli and her counsel) and the reasoning in an interlocutory California appellate decision to find Petitioner guilty of violating several disciplinary rules; however, bar counsel did not provide the court with the underlying briefs, records or other supporting documents from either proceeding. [20] Further, the latter decision was rendered *after* the charges had been filed and served, yet the charges were never amended. This raises *Ruffalo* due process issues. It also fatally tainted the court's deliberations – particularly in the absence of the underlying documents.

The court also found Petitioner violated certain disciplinary rules as to other documents he filed in the California litigation; however, those documents were never introduced into evidence. Under *Goldberg*, such reliance is improper, and violated Petitioner's rights to due process. Respondent compounded the problem by failing to review the

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[20] The methods used by Ms. Cavalli to obtain that award are discussed in the record, as are the bases underlying the California appellate decision; they were raised in both the D.C. and Arizona proceedings.

record, address Petitioner's arguments under *Selling* and recognize the due process violations in the D.C. proceedings. Respondent thus violated Petitioner's rights to due process as well.

CONCLUSION

Attorney disciplinary proceedings are among the most contentious of all litigation. This Court alone has the power to bring what is "right and just" to this field and to ensure the rights of all attorneys are protected. For all of the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BRUCE A. PELKEY

Petitioner

Appendix A

SUPREME COURT OF ARIZONA

Arizona Supreme Court No. SB-09-0083-D,
Disciplinary Commission No. 09-4000

In the Matter of a Member of the State Bar of
Arizona, BRUCE A. PELKEY,
Attorney No. 7210 Respondent.

FILED 09/23/2009

Judgment and Order

This matter having come on for hearing before the Disciplinary Commission of the Supreme Court of Arizona, it having duly rendered its decision, and this Court having considered Respondent's Petition for Review and the response of the State Bar, accordingly,

IT IS ORDERED that the Petition for Review is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Respondent BRUCE A. PELKEY, a member of the State Bar of Arizona, is hereby disbarred, effective the date of this judgment and order, for conduct in violation of his duties and

obligations as a lawyer, as disclosed in the Disciplinary Commission Report.

IT IS FURTHER ORDERED that Respondent shall comply with all applicable provisions of Rule 72, Rules of the Supreme Court of Arizona, and promptly inform this Court of his compliance with this Order as provided in Rule 72(e).

IT IS FURTHER ORDERED that Respondent shall comply with all rule provisions regarding reinstatement proceedings.

IT IS FURTHER ORDERED that Respondent BRUCE A. PELKEY shall be assessed costs and expenses of the disciplinary proceedings as provided in Rule 60(b).

DATED this 23rd day of September, 2009.

REBECCA WHITE BERCH
Chief Justice

TO:
Bruce A Pelkey, Steve Little
Leticia V D'Amore, Sandra Montoya
Perry Thompson, Don Lewis
Beth Stephenson, Jode Ottman
Lexis Nexis

Appendix B

BEFORE THE DIISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

No. 09-4000

IN THE MATTER OF AN INACTIVE MEMBER OF THE STATE BAR OF ARIZONA, **BRUCE A. PELKEY, Bar No. 7210, RESPONDENT**

ORDER UPON DECISION

Filed June 25, 2009

The Disciplinary Commission having this date made its Report in the above captioned matter, and pursuant to Rules 58(e) and 53(i), Ariz. R. Sup. Ct.,

IT IS ORDERED

1. The Disciplinary Commission Report in the above captioned matter is hereby adopted by the Commission, and it shall be filed with the Disciplinary Clerk.

2. Respondent and the State Bar may file with the Disciplinary Clerk a Notice of Intent to File a Petition for Review by the Supreme Court within ten days of service of the Disciplinary Commission Report. The Petition for Review is due 20 days

thereafter, and a cross-petition for review may be filed within 15 days after service of a petition for review, pursuant to Rule 59(a). The form and contents of the petition shall comply with Rule 59(d).

3. If no Petition for Review is timely filed, the Disciplinary Clerk, under the provisions of Rule 59(i), shall prepare and file a certificate attesting to those facts and submit this matter to the Clerk of the Supreme Court for entry of Judgment of Disbarment, pursuant to Rule 60(a)(1).

4. If a Petition for Review is filed, upon the expiration of the time for filing a Cross-Petition for Review, the Disciplinary Clerk shall transmit a partial record to the Clerk of the Supreme Court pursuant to Rule 59(e).

5. In the event a Petition for Review is granted, or if ordered by the Court, *sua sponte,* the Disciplinary Clerk shall transmit the entire record to the Clerk of the Supreme Court pursuant to Rule 59(h) and (i).

RESPECTFULLY SUBMITTED this 25th day of June, 2009.

Jeffrey Messing / cr
Jeffrey Messing, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 25th day of June, 2009.

Copy of the foregoing mailed
this 25th day of June, 2009, to:

Bruce A. Pelkey
Respondent
Post Office Box 812
Bakersfield, CA 93302-0001

Stephen P. Little
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

By: Evelyn Loza /mps

BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

No. 09-4000

IN THE MATTER OF AN INACTIVE MEMBER OF THE STATE BAR OF ARIZONA, **BRUCE A. PELKEY, Bar No. 7210, RESPONDENT**

DISCIPLINARY COMMISSION REPORT

Filed June 25, 2009

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on June 13, 2009, pursuant to Rules 53(i) and 58, Ariz. R. Sup. Ct., for its consideration of whether to impose reciprocal discipline of disbarment upon Respondent as ordered by the District of Columbia Court of Appeals on December 23, 2008. Claims of exceptions set forth in Rule 53(i)(3), Ariz. R. Sup. Ct., were filed by Respondent.

On April 10, 2009, Respondent filed a Response claiming that pursuant to the grounds set forth in Rule 53(i)(3), Ariz. R. Sup. Ct., there are substantial grounds under each of the four subsection [sic] by way of evidence and as a matter of law that the imposition of identical or substantially similar discipline by the Supreme Court of Arizona is unwarranted. By Order of the Disciplinary

Commission, the State Bar filed a Reply urging the Commission to impose reciprocal discipline. 1 On May 4, 2009, Respondent filed an Objection to the Commission's Order and Motion for Rescission of Same.

1 *See* Commission Order filed April 22, 2009.

DECISION

The seven members 2 of the Disciplinary Commission unanimously recommend imposing reciprocal discipline of disbarment and costs of these disciplinary proceedings, including any costs incurred by the Disciplinary Clerk's office and the Supreme Court of Arizona. In addition, Respondent's Motion for Rescission is hereby denied. The Commission further incorporates by reference the District of Columbia Court of Appeals Opinion and Order, which is attached as Exhibit A.

RESPECTFULLY SUBMITTED this 25th day of June, 2009.

Jeffrey Messing / cr
Jeffrey Messing, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 25th day of June, 2009.

Copy of the foregoing mailed
this 25th day of June, 2009, to:

Bruce A. Pelkey
Respondent
Post Office Box 812
Bakersfield, CA 93302-0001

Stephen P. Little
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
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By: Evelyn Loza /mps

2 Commissioners Gooding, Horsely and Todd did not participate in these proceedings. Mary Carlton participated as an ad hoc public member.

EXHIBIT A

Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 06-BG-893

IN RE BRUCE A. PELKEY, RESPONDENT.
A Member of the Bar of the
District of Columbia Court of Appeals

On Report and Recommendation
of the Board on Professional Responsibility
(BDN 67-03)

(Argued January 23, 2008
Decided December 23, 2008)

Hamilton P. Fox III for respondent.

Julia L. Porter, Senior Assistant Bar Counsel, with whom *Wallace E. Shipp, Jr.*, Bar Counsel, and *Judith Hetherton*, Senior Assistant Bar Counsel, were on the brief, for the Office of Bar Counsel.

Before REID, *Associate Judge*, FARRELL, *Associate Judge, Retired*, * and PRYOR, *Senior Judge*.

REID, *Associate Judge*: The Board on Professional Responsibility ("the Board") has recommended that respondent Bruce A. Pelkey be disbarred; that he be ordered to pay restitution to the Client's Security Fund with interest at a six percent rate; and that he be required to satisfy all outstanding judgments and orders against him in favor of complainant Linda Cavalli. The Board recommended disbarment based on its conclusion that Mr. Pelkey violated multiple provisions of the District of Columbia Rules of Professional Conduct. Mr. Pelkey challenges the Board's report and recommendation.

* Judge Farrell was an Associate Judge of the court at the time of argument. His status changed to Associate Judge, Retired, on July 1, 2008.

We conclude that Bar Counsel presented clear and convincing evidence that Mr. Pelkey violated the Rules of Professional Conduct, including Rules 8.4 (b) (concerning criminal conduct "that reflects adversely on the lawyer's honesty, [or] trustworthiness . . . ."), 8.4 (c) (relating to dishonest, fraudulent and deceitful conduct); 8.4 (d) (pertaining

to "conduct that seriously interferes with the administration of justice"); and 3.1, 3.2 (a), 3.3 (a)(1), and 4.4 (a) (relating to frivolous legal proceedings, proceedings that "would serve solely to harass" another, "false statement[s] of fact or law [made] to a tribunal," and use of "means that have no substantial purpose other than to . . . delay, or burden a third person"). We also hold, in agreement with the Board, that, on this record, disbarment is the appropriate sanction for Mr. Pelkey's misconduct, and that his reinstatement should be conditioned upon his making full restitution to the Clients' Security Fund with interest, and his satisfaction of all judgments against him and in favor of Ms. Cavalli or related business entities.

FACTUAL SUMMARY

The record before us, which includes factual findings made by the Hearing Committee and affirmed by the Board, shows that Mr. Pelkey, an attorney admitted to the District of Columbia Bar on April 3, 1995, practiced law in Arizona after being

admitted in that jurisdiction in 1982.1 Eventually, he moved to Virginia and accepted a post as a professor of law at Regent University. He also gave

1 In addition to his law degree from Pepperdine University School of Law, Mr. Pelkey holds a masters degree in business administration from Arizona State University.

lectures in the Soviet Union, and he established an international consulting group. Ms. Cavalli specialized in international economic 2 development and worked as an investment banker in California before moving to Virginia. For a short period of time, she joined an entity in which a former United States Congressman, Mark Siljander, was involved and which was designed to encourage investment in the United States by foreign investors.

2 Ms. Cavalli graduated with highest honors from the University of California at Davis.

Mr. Siljander introduced Ms. Cavalli to Mr. Pelkey in June 1996. That was the beginning of a personal relationship and a mutual interest and collaboration in international business ventures, particularly through a program operated by the United States Immigration and Naturalization Service ("INS"). Mr. Pelkey's role emerged as that of attorney and legal counsel for the ventures (his

duties involved drafting incorporation documents and contracts), and Ms. Cavalli used her expertise and experience to generate proposals for immigrant investors, as well as to prepare business plans and marketing documents. She also developed investment opportunities for funds resulting from work with overseas investors. Consulting or investment entities established by Mr. Pelkey and by Ms. Cavalli played a role in the Pelkey/Cavalli business ventures. These included Consulting Group International ("CGI") and Trading Partners International ("TPI"), both owned by Mr. Pelkey; and Signet Services Group ("Signet") and Tourism Support Services ("TSS"), both belonging to Ms. Cavalli. Two other entities, one of which became a subject of dispute between Ms. Cavalli and Mr. Pelkey, were Trading Partners International of California ("TPIC") and American Opportunity International Services ("AOIS").

Between 1996 and 1998, Mr. Pelkey and Ms. Cavalli not only planned certain business ventures, but also established them and realized income from those ventures, particularly through a proposal (prepared by Ms. Cavalli) for an export trading Regional Center under INS's Immigrant Investor Pilot Program (also known as the U.S. Investor Visa Program). Business plans were developed, primarily by Ms. Cavalli, for an African project under the Investor Pilot Program, with M. Tshiamala Kadala

Mianda of the Democratic Republic of the Congo; and for an investment project with the Russian Fund Vostock for which both Mr. Pelkey and Ms. Cavalli served as the contacts. Ms. Cavalli advanced approximately $32,000 of her own personal funds to help cover the costs of the ventures. The Hearing Committee and the Board determined that Mr. Pelkey had provided legal services to the Pelkey/Cavalli business entities. As the Board stated: "Although the Committee does not specify the business entities, the record supports a finding that [Mr. Pelkey] provided legal advice, at a minimum, for Trading Partners International of California (made up of entities owned by Respondent and Cavalli) and [AOIS] (jointly created by Respondent and Cavalli)."

In April 1997, Ms. Cavalli submitted a proposal to INS for the establishment of TPIC as a Regional Center under the Immigrant Investor Pilot Program; the proposal stated that "TPIC is wholly owned by its two members, [TPI], a subsidiary of [CGI], and [Signet]." INS sent Ms. Cavalli a letter in August 1997, approving the proposal and designating TPIC as a Regional Center under the Immigrant Investor Pilot Program. A related contract with Mr. Tshiamala and his California export trading company, Somico LLC, was executed in February 1998, resulting in $177,500 in fees for the Cavalli/Pelkey African investor business

venture. In addition, Mr. Pelkey and Ms. Cavalli traveled to Russia in 1997 to solicit business from Fund Vostock, and a contract with that Fund was executed in October 1997. Fund Vostock made a $50,000 investment with TPIC in November 1997, and another $50,000 investment in 1998.

The factual bases for many of Bar Counsel's charges against Mr. Pelkey took place after the relationship between Ms. Cavalli and Mr. Pelkey crumbled. 3 Ms. Cavalli returned to California in

3 Mr. Pelkey and Ms. Cavalli were first introduced socially in 1996 and they had both a romantic and a business relationship for approximately two and one-half years.

August 1998, and she learned, around 1999, that neither her name nor Signet's name appeared in the TPIC legal documents that Mr. Pelkey drafted and filed, that he in fact had listed only his name and those of his entities, CGI and TPI, as the owners and managers of TPIC. By around April 2000, the Cavalli/Pelkey business relationship had deteriorated substantially and Ms. Cavalli and Mr. Pelkey were locked in bitter litigation in the District of Columbia Superior Court, filed by Ms. Cavalli in May 2000, and in California Superior Court, lodged by Mr. Pelkey in August 2000. A heated, fractious, and bitter dispute erupted concerning an Arbitration

Agreement signed by both which was designed to resolve the litigation in the District of Columbia and the California courts.

Mr. Pelkey and Ms. Cavalli disagreed over whether Ms. Cavalli was a business partner (Ms. Cavalli's position) or a consultant (Mr. Pelkey's position). Ms. Cavalli insisted that Mr. Pelkey had agreed to take responsibility for forming TPIC as an entity wholly owned by TPI (Mr. Pelkey's entity) and Signet (Ms. Cavalli's entity), with Mr. Pelkey as a "Managing Partner" and Ms. Cavalli also as a "Managing Partner." The Hearing Committee credited the testimony of Ms. Cavalli, and found that documents created in 1996 and 1997, including a February 26, 1997 document prepared by Ms. Cavalli and personally edited by Mr. Pelkey in his own handwriting, confirmed not only that Ms. Cavalli was intended to be a business partner for the ventures, but also that Mr. Pelkey was not "the prime mover in the establishment and success of th[e] immigration investor program," as he claimed.4

4 In finding Ms. Cavalli's testimony credible, the Hearing Committee stated:

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> Having observed Ms. Cavalli for two days on the witness stand, we find her testimony most candid and truthful. She did not try to avoid answering questions, her answers were responsive to the questions – not evasive, the documentary evidence reinforced her story, and there was no impeachment of her testimony.

In contrast, the Hearing Committee discredited Mr. Pelkey's testimony, saying in part:

> [Mr. Pelkey's] testimony was found to be largely lacking in credibility – particularly on the crucial factual issues: (1) were he and Cavalli partners, (2) was it understood that Cavalli would have an ownership interest in their venture, particularly TPIC, and (3) did they have a personal/romantic relationship in the 1996-1998 timeframe. Respondent's demeanor during six days of hearings was exemplary, as was everyone else involved in the hearing. However, on many occasions during his testimony, Respondent simply strayed from what we perceive to be the truth. This was a heavily-documented record

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> (five large volumes of exhibits), including many memoranda, e-mails, drafts, marketing brochures, reports/studies for clients, correspondence, and court papers (including verified declarations) prepared and filed in the 2000-2005 litigation between these two persons. Both during Respondent's direct testimony (over a say), as well as a day and a half of cross examination by the Hearing Committee, it was clear that he was dissembling badly over certain key documents – documents often from his own business files, and in other ways.

In addition, the Board asserted: "Respondent argues that [Ms.] Cavalli was never an equity partner in any of his companies, but the record is replete with evidence to support the [Hearing] Committee's findings to the contrary."

The Hearing Committee then provided several pages of concrete examples to support its credibility determination concerning Mr. Pelkey.

In addition to disagreeing about whether Ms. Cavalli was a business partner or a consultant, Mr. Pelkey and Ms. Cavalli quarreled about the funds generated from their business ventures. These funds

were deposited in Mr. Pelkey's bank accounts as they were received, and he was the sole signatory on the accounts. In April and June 1998, respectively, Ms. Cavalli and Mr. Pelkey placed $30,000 from the Fund Vostock project and $50,000 from the African project into Ms. Cavalli's investment account in Costa Rica, TSS. Mr. Pelkey claimed that these funds belonged to him, and his efforts to retrieve the funds invested in TSS, as well as resulting dividends, sparked the litigation filed by Ms. Cavalli and by him. In late 1999, Mr. Pelkey began to demand the return of funds from the TSS investment which he then calculated to be $125,000 (the original $80,000 investment plus dividends). After receiving letters from Mr. Pelkey's attorney, Ms. Cavalli authorized the release of two payments to Mr. Pelkey, $15,000 in late October and $19,000 in late November. The Hearing Committee determined that, in December 1999, a law firm representing Mr. Pelkey accused Ms. Cavalli of "fraudulent actions" and demanded $110,000 within fifteen days; an earlier October 1999 letter stated that Ms. Cavalli would be in "violation of the California Penal Code" if she failed to remit the demanded sums of money.

Mr. Pelkey's actions regarding an arbitration agreement, designed to mediate the complaints filed in the District of Columbia and California courts, not only served as the factual basis of some of Bar

Counsel's charges and the Hearing Committee's findings, but also formed the basis for the Court of Appeal of the State of California's decision to impose a monetary sanction against him. After Mr. Pelkey and Ms. Cavalli executed their Arbitration Agreement on July 19, 2001, Mr. Pelkey balked at arbitrating. The Hearing Committee determined that he "signed [the agreement to arbitrate] . . . in part, to avoid going to trial in the civil action pending in the [District], but with the hidden intent to later challenge the arbitration agreement if things didn't work out." He began to draft a declaration in support of a motion to rescind the agreement on July 20, 2001, and he personally filed the motion and declaration on March 23, 2002 in California, after Ms. Cavalli had filed a formal demand for arbitration in February 2002, following unsuccessful efforts to arbitrate in accordance with the arbitration agreement. Mr. Pelkey blamed Ms. Cavalli for forcing him to sign the arbitration agreement, and complained about the arbitration fees.

The California Superior Court denied Mr. Pelkey's motion to rescind the arbitration agreement on June 21, 2002, and on June 27, 2003, after hearing testimony from Mr. Pelkey and Ms. Cavalli, the arbitrator issued a decision finding that "[Mr.]

Pelkey had committed fraud in his dealings with Ms.Cavalli." 5 The arbitrator awarded her approximately $300,000 ($238,822 in compensatory damages

5 The arbitrator found

> by clear and convincing evidence that [Mr.] Pelkey intentionallymisled [Ms.] Cavalli as to his true plan for their joint business relationship. [Ms.] Cavalli thought she was an equal partner with [Mr.] Pelkey based on statements of [Mr.] Pelkey, documents and conduct of the parties; and [Mr.] Pelkey at all times fraudulently concealed the fact that he never intended to treat [Ms.] Cavalli as a partner.

and $58,843 in attorney's fees and costs).6 The California Superior Court affirmed the arbitrator's award on August 18, 2004, and ordered Mr. Pelkey to pay Ms. Cavalli $22,000 in additional attorney's fees. Undeterred, Mr. Pelkey lodged three separate

6 The arbitrator determined that Mr. Pelkey had been "untruthful during live sworn testimony at the Arbitration Hearing," and that "[i]n addition to

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contradicting himself under oath, and making false prior statements under oath, a number of documents were introduced into evidence which contradict salient portions of his testimony."

appeals relating to the litigation, prompting the Court of Appeal of the State of California, on May 31, 2005, to verbally chastise him for "blatant misrepresentation" of one of the court's rulings, "distort[ion] of the court's comments at a hearing," and for a meritless appeal. The court imposed a sanction in the amount of $6,000, to be paid to Ms. Cavalli.7 The Hearing Committee's examination of "verified statements" by Mr. Pelkey, made in a March 14, 2001 document, raised other questions about Mr. Pelkey's honesty; the Hearing Committee

7 Ms. Cavalli had requested around $19,000 in attorney's fees and costs. In explaining the reasons for the sanction, the court stated in part:

> There is no valid reason for this appeal. The bulk of Pelkey's arguments are nothing more than an attempt to relitigate his

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> previous failed appeal of the final June 21, 2002 fee award, which is now long since final. His insistence that this order remains subject to collateral attack under a highly dubious theory of voidness points strongly to a motive to harass and delay . . .He . . . stretches the record beyond recognition in the characterization of his February 18, 2003 letter. He similarly distorts the court's comments at the hearing on his Code of Civil Procedure . . . motion . . . . Finally, Pelkey's attempt to disguise the court's continuance of his . . . motion as a denial, and then to challenge that non-ruling on appeal, is patently frivolous.
>
> If a reputation for honesty is the coin of the judicial realm, here Pelkey has squandered his riches on such positions most unwisely. He has dragged Cavalli and this court into a factual and legal thicket, requiring an unduly large investment of the plaintiff's time and resources and the court's as well . . . .

cited several statements that it "found to be false based on the record" it had compiled; these included:

> I have never been in business with Ms. Cavalli, in any manner whatsoever.
>
> Ms. Cavalli made absolutely no investments into any of the businesses . . . . There were never any financial contributions made by Ms. Cavalli into any of the businesses . . . .
>
> [N]o joint business activities were ever conducted by Ms. Cavalli and I . . . . [T]here was no '2 ½ year business relationship' between Ms. Cavalli and I.
>
> [T]here were never any joint assets of any kind or nature whatsoever, between Ms. Cavalli and I or between Ms. Cavalli and my businesses.
>
> Ms. Cavalli has created a false impression . . . that our 'personal relationship' was something more than a friendship . . . . Ms. Cavalli and I have never had any romantic relationship . . . .

While the Hearing Committee recommended that the charges under Rules 1.15 (a) and (b) "be dismissed as not proven by clear and convincing evidence on the existence of an attorney-client

relationship," the Board concluded that "based on the [Hearing] Committee's findings, . . . [Mr. Pelkey's] conduct did amount to a misappropriation of the funds of two of his corporate clients"; that "he held himself out as a lawyer and exploited his position both in his dealings with [Ms.] Cavalli as well as his work on behalf of their jointly owned companies, TPIC and AOIS"; and that "[t]he fiduciary duty that [he] owed to these companies bears a direct relationship to the financial services he provided." Hence, "[b]y treating the financial assets of [TPIC and AOIS] as his own, . . . [Mr. Pelkey] engaged in intentional misappropriation" under Rule 1.15 (a). Furthermore, the Board declared that because Mr. Pelkey "failed promptly to render a full accounting of a client's entrusted funds [that is, those belonging to TPIC and AOIS] when requested to do so," and further, because he "utilized [his attorney accounts - three belonging to CGI and two to TPIC] interchangeably for his own personal use, . . . Bar Counsel established by clear and convincing evidence" that he violated Rule 1.15 (b).8

8 The Hearing Committee recommended that the charges under Rules 1.7 (b)(4), 1.8 (a) and (g)(2), and 1.15 (a) and (b) "be dismissed as not proven by clear and convincing evidence on the existence of an attorney-client relationship." Because of its

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conclusions under Rules 1 (a) and (b) and its recommendation of disbarment, the Board did not address the alleged violations of Rules 1.7 (b)(4), and 1.8 (a) and (g)(2).

The Board sustained the Hearing Committee's findings and conclusions relating to Mr. Pelkey's violations of Rules 3.1 (filing frivolous appeals in the California litigation), 3.3 (a) (making false statements in the sworn March 14, 2001 declaration filed in the Superior Court of California), 3.2 (a) and 4.4 (causing delay solely to harass and burden Ms. Cavalli through his efforts to rescind the arbitration agreement and other behavior). The Board also addressed the alleged violations of Rule 8.4. Contrary to the conclusion of the Hearing Committee that Bar Counsel failed to prove "the 'intent' element" of the Rule 8.4 (b) violation, the Board "f[ou]nd that [Mr. Pelkey's] transfer of funds from an account belonging to a company jointly owned by himself and [Ms.] Cavalli to an account within his exclusive control constituted theft . . .[,] " and hence, he "committed a crime that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer . . . ." The Hearing Committee and the Board both agreed that Mr. Pelkey violated Rule 8.4 (c) by being dishonest in his business dealings with Ms. Cavalli. Both also concluded that Mr. Pelkey violated

Rule 8.4(d), seriously interfering with the administration of justice, when he filed frivolous motions and appeals in the California courts.9

9 As for the alleged violation of Rule 8.4 (g) concerning the threat of "criminal charges . . . solely to obtain an advantage in a civil matter," the Hearing Committee believed that Bar Counsel sustained its burden of proof, but the Board found the references in Mr. Pelkey's October 23, 1999 letter to "a violation of the California Penal Code," and in his December 1999 letter, to "invok[ing] all governmental investigative resources available to us . . . [,]" to be "sufficiently vague" to dissuade the Board from recommending a violation of Rule 8.4 (g).

Based upon Mr. Pelkey's rule violations, especially Rule 8.4 (c), the Hearing Committee recommended a three-year suspension with reinstatement conditioned on a fitness requirement. However, partly in light of its conclusion that Mr. Pelkey violated Rules 1.15 (a) and (b) by engaging in intentional misappropriation, the Board recommended disbarment as a sanction, but the Board indicated that even without a finding of intentional misappropriation, disbarment was the appropriate sanction.

ANALYSIS

Standard of Review

"When examining a Report and Recommendation from the Board on Professional Responsibility, . . . [w]e must accept the findings of fact made by the Board unless they are unsupported by substantial evidence of the record, and shall adopt the recommended disposition of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted."10 Similarly, "the

10 *In re Elgin*, 918 A.2d 362, 373 (D.C. 2007) (quoting D.C. Bar R. XI, § 9 (g) (2006)) (internal quotation marks omitted).

Board is obligated to accept the hearing committee's factual findings if those findings are supported by substantial evidence in the record, viewed as a whole."11 This court owes no "deference to the Board's determination of ultimate facts, which are really conclusions of law,"12 "and we have the obligation to make our own determination on the issue."13

11 *In re Bailey*, 883 A.2d 106, 115 (D.C. 2005) (citation and internal quotation marks omitted).

12 *In re J.E.S.*, 670 A.2d 1343, 1344 (D.C. 1996) (citation and internal quotation marks omitted). Conclusions of law are reviewed de novo, *In re Lloyd F. Ukwu*, 926 A.2d 1106, 1116 (D.C. 2007).

13 *In re Fair*, 780 A.2d 1106, 1110-11 (D.C. 2001).

The Rule 8.4 (b), (c) and (d), and Rule 3.3 (a), 3.1, 3.2 (a), and 4.4 (a) Violations

Mr. Pelkey challenges the Board's findings and conclusions that he violated Rules 8.4(b), (c) and (d).14 With respect to Rule 8.4 (b), he contends that the Bar Counsel did not present clear and convincing evidence of theft, specifically, that he "had the requisite specific intent" or that he made a "transfer of funds not belonging to him." He also emphasizes the Hearing Committee's conclusion with respect to the Rule 8.4 (b) violation, that the evidence was

14 Rule 8.4 of the District of Columbia Rules of Professional Responsibility provides in pertinent part:

> It is professional misconduct for a lawyer to:
>
> . . . .

> (b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
> (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
> (d) Engage in conduct that seriously interferes with the administration of justice . . . .

insufficient to "find that Respondent intentionally defrauded [Ms.] Cavalli, or otherwise committed a criminal act." As for Rule 8.4 (c) relating to dishonesty, Mr. Pelkey claims that the evidence presented by Bar Counsel failed to establish "the necessary dishonest intent," and that the Hearing Committee made a clear factual error by not finding that he filed the organization papers for TPIC showing that he wholly owned that entity on April 9, 1997, approximately three weeks before Ms. Cavalli submitted the INS application on April 28, 1997.

Furthermore, he asserts, the Board "improperly applied" the District's Rule 8.4 (d) and Rule 3.3 (a)15 instead of the California rules because the charged actions took place in the California judicial proceeding.16

15 Rule 3.3 (a) provides in pertinent part:

> (a) A lawyer shall not knowingly:
> (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . .

16 He claims that Rule 8.5 (b)(1) mandates application of the applicable California rules, not the District's rules. Rule 8.5 (b) provides:

> (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:
>
> (1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and
> (2) for any other conduct, (i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and (ii) if the lawyer is

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> licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Bar Counsel argues that "[t]he Board correctly found that [Mr. Pelkey's] 'outright taking' of the funds owed to [Ms.] Cavalli . . . constituted theft in violation of Rule 8.4 (b) . . . ." In determining whether Mr. Pelkey engaged in theft, Bar Counsel asserts, "the Board adopted the [Hearing] Committee's finding that [Mr. Pelkey] intentionally led [Ms.] Cavalli to believe that she was an equal partner in their business venture and would share equally in its profits," and the Board "also adopted the [Hearing] Committee's finding that [Mr. Pelkey] "dishonestly and surreptitiously prepared and filed documents omitting [Ms.] Cavalli from an ownership interest, and then engaged in an 'outright taking' or 'appropriation of money rightfully belonging to his business partner.'" Furthermore, Bar Counsel maintains that in "deliberately deceiv[ing] and

defraud[ing] [Ms.] Cavalli by leading her to believe that they were partners in their joint business venture," Mr. Pelkey violated Rule 8.4 (c) in addition to Rule 8.4 (b). Bar Counsel points out that for "[o]ver a two and a half year period," Mr. Pelkey "intentionally led [Ms.] Cavalli to believe they were equal partners in the business venture and thereby induced her to contribute more than $32,000 of her own funds and her full-time services"; but then "'intentionally and surreptitiously' excluded her from an ownership interest" and took the funds from the ventures. As for Rule 8.4 (d) and Rule 3.3(a), Bar Counsel contends that these District rules apply because Mr. Pelkey "made false []representations and harassed [Ms.] Cavalli in the action before the D.C. Superior Court," and Mr. Pelkey was "neither licensed to practice in California nor admitted to practice before the courts there."

First, our de novo review of the record constrains us to conclude, in agreement with Bar Counsel and the Board, that Mr. Pelkey violated Rule 8.4 (b). We have recognized that "a criminal conviction is [not] a prerequisite for finding a violation of Rule 8.4 (b)."17 We hold in this disciplinary proceeding that Bar Counsel proved by clear and convincing evidence that Mr. Pelkey committed theft by "wrongfully obtain[ing] or

17 *In re Slaughter*, 929 A.2d 433, 445 (D.C. 2007) (quoting *In re Slattery*, 767 A.2d 203, 207 (D.C. 2001) ("an attorney may be disciplined for having engaged in conduct that constitutes a criminal act that reflects adversely on his or her fitness as a lawyer under Rule 8.4 (b) or engaging in dishonest or deceitful conduct, despite not having been prosecuted for such actions")).

us[ing] the property of another [Ms. Cavalli] with intent: (1) To deprive the other of a right to the property or a benefit of the property; or (2) To appropriate the property to his . . . own use . . . ."18 With respect to the intent element, "theft under District law 'does not require an intent to appropriate property permanently.'"19

18 *In re Slattery, supra* note 17, 767 A.2d at 212 (citing D.C. Code § 22-3811 (b) [Repl. 1996; recodified at D.C. Code § 22-3211 (2001)]).

19 *In re Gil*, 656 A.2d 303, 305 (D.C. 1995) (quoting *Fredericks v. United States*, 306 A.2d 268, 270 (D.C. 1973)).

The record evidence compiled by Bar Counsel in this case established that Ms. Cavalli was Mr. Pelkey's business partner in ventures pertaining both to the contract with Mr. Tshiamala and Somico LLC under the U.S. Investor Visa Program, and the

contract with Fund Vostock and that she contributed $32,000 of her own funds as well as her full-time labor to support these ventures. A February 1997 document edited by Mr. Pelkey in his own handwriting confirmed that Ms. Cavalli was intended to be a business partner for the ventures and, as such, she was entitled to have her entity, Signet, included in the ownership of TPIC and to share the returns generated in behalf of TPIC. Yet, Mr. Pelkey not only left Signet out of TPIC's ownership papers, but also put the monetary returns from these ventures in his own bank accounts which he solely controlled, thus taking or appropriating the monies, some of which belonged to Ms. Cavalli, and using them as he saw fit. Mr. Pelkey's argument that the Hearing Committee made a clear factual error by not finding that he filed the organization papers for TPIC before Ms. Cavalli submitted the INS application, ignores the evidence credited by the Hearing Committee (and earlier by the arbitrator) that Ms. Cavalli was intended to be a business and equity partner, not a consultant, and hence, Signet should have been named in the organization documents as well as Ms. Cavalli as a Managing Partner. The fact that Mr. Pelkey may have filed the business organization documents before the INS application was submitted is of no moment.

Moreover, through his legal counsel who accused Ms. Cavalli of "fraudulent actions," Mr.

Pelkey boldly insisted that Ms. Cavalli pay him $125,000 from the TSS Costa Rican investment account (the $80,000 placed in the account from the Pelkey/Cavalli business ventures plus what Mr. Pelkey deemed to be dividends owed on that sum); Ms. Cavalli felt compelled to send him $34,000 of the TSS funds. Mr. Pelkey persisted and through litigation he deliberately sought to deprive Ms. Cavalli of any assets resulting from the Pelkey/Cavalli ventures. Mr. Pelkey's actions demonstrated not only an intent to deprive Ms. Cavalli of funds properly belonging to her, but also to take and claim the other returns on the Pelkey/Cavalli business ventures as his own, to be placed in his bank accounts under his sole control, and to be used as he saw fit.

Second, our de novo review of the record further leaves us with no doubt that Bar Counsel introduced more than sufficient evidence to establish Mr. Pelkey's blatant and unconscionable violation of Rule 8.4 (c) over the course of several years. At the outset of our analysis of this charged violation, we note that "'[a]cts unrelated to the practice of law may nonetheless violate [Rule 8.4 (c)]." 20 In terms of proof, "[a] violation of Rule 8.4 (c) requires a showing that a respondent was dishonest, deceitful, fraudulent or misrepresented the truth." 21 "Dishonesty is a lack of honesty, probity, integrity and straightforwardness"; 22 and "[d]eceit is the

active suppression of facts by one bound to disclose them, or the giving of 'information of other facts which are likely to mislead for want of communication of that fact.'"23

20 *In re Gil, supra* note 19, 656 A.2d at 306 (quoting *In re Kennedy*, 542 A.2d 1225, 1228 (D.C. 1988)).

21 *In re Slattery, supra* note 17, 767 A.2d at 213.

22 *Id.* (citing *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990)).

23 *Id.* (citing *In re Shorter, supra* note 22, 570 A.2d at 777 n.12).

Mr. Pelkey not only was dishonest but also deceitful within the meaning of Rule 8.4(c). In his June 2003 ruling, the arbitrator characterized Mr. Pelkey as "untruthful during live sworn testimony at the Arbitration Hearing," determining that Mr. Pelkey made "false prior statements under oath," and that "documents were introduced which contradicted salient portions of his testimony." Nevertheless, Mr. Pelkey's blatant dishonesty persisted in his 2005 testimony before the Hearing Committee. In its December 16, 2005 report, the Hearing Committee determined that Mr. Pelkey's

"testimony was . . . largely lacking in credibility – particularly on the crucial factual issues: (1) were he and [Ms.] Cavalli partners, (2) was it understood that [Ms.] Cavalli would have an ownership interest in their ventures, particularly TPIC, and (3) did they have a personal/romantic relationship in the 1996-1998 timeframe." Moreover, as we have emphasized previously, the February 1997 document edited by Mr. Pelkey in his own handwriting confirmed that the two intended Ms. Cavalli to be a business partner for the Pelkey/Cavalli business ventures, but Mr. Pelkey steadfastly and dishonestly attempted to deny this fact as well as the fact that Ms. Cavalli was an equity partner in the ventures. Furthermore, the Hearing Committee ascertained that several "verified statements" by Mr. Pelkey in a March 2001, document were dishonest including: "I have never been in business with Ms. Cavalli, in any manner whatsoever"; "There were never any financial contributions made by Ms. Cavalli into any of the businesses"; "There was no '2 ½ year business relationship' between Ms. Cavalli and I" and "Ms. Cavalli and I have never had any romantic relationship." Even the Court of Appeal of the State of California found it necessary to chastise Mr. Pelkey on May 31, 2005, for "blatant misrepresentation" of one of its rulings, and for "distort[ion] of the court's comments at a hearing."

All of the statements mentioned above which were made by Mr. Pelkey, the credibility determinations made by the arbitrator and the Hearing Committee, and the chastising comments of the California Court of Appeal reflect, Mr. Pelkey's glaring lack of honesty, integrity and probity. Moreover, Mr. Pelkey's actions in attempting to suppress the truth regarding his business and personal relationships with Ms. Cavalli, despite his obligation to be truthful, can only be described as deceitful and as a deliberate effort to mislead the arbitrator and the Hearing Committee. Thus, we conclude that Bar Counsel proved by clear and convincing evidence that Mr. Pelkey clearly violated Rule 8.4 (c).

Third, based on our *de novo* review, we conclude that Bar Counsel presented clear and convincing evidence that Mr. Pelkey violated Rules 8.4 (d), 3.1, 3.2 (a), 3.3 (a)(1), and 4.4 (a). In filing frivolous appeals in the California court, and in moving in the court both to rescind the arbitration agreement after signing it and to remove the arbitrator after participating in the selection of him, Mr. Pelkey violated Rule 8.4 (d) by "engag[ing] in conduct that seriously interferes with the administration of justice," and 3.3 (a)(1)24 by filing a false verified declaration in a tribunal. He also ran afoul of Rules 3.1 25 and 3.2 (a) 26 by harassing Ms. Cavalli with respect to the arbitration agreement,

24 Rule 3.3 (a)(1) states: "A lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6 [concerning confidentiality of information]."

25 Rule 3.1 specifies in pertinent part:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law . . . .

26 Rule 3.2 (a) states: "In representing a client, a lawyer shall not delay a proceeding when the lawyer knows or when it is obvious that such action would serve solely to harass or maliciously injure another."

and Rule 4.4 (a)27 by burdening her with an unnecessarily protracted arbitration proceeding and litigation in the California courts,28 as he engaged in tactics to avoid and prevent the arbitration, even

though he had signed an agreement consenting to arbitration.

27 Rule 4.4 (a) reads:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

28 Since we conclude that Mr. Pelkey's violation of Rules 8.4 (b), (c), and (d) alone, and together with his violation of Rules 3.3 (a), 3.1, 3.2 (a), and 4.4 (a), merits the ultimate sanction of disbarment, we do not consider the other charged violations, including Rules 1.15 (a) and (b).

Sanction

As his first position on sanction, Mr. Pelkey claims that his behavior merits no sanction. As he put it: "[I]t is Mr. Pelkey's position that he has committed no violation of the Rules of Professional Conduct, and therefore . . . no sanction is appropriate." As a secondary position, he asserts that "the sanction should not be the Board's recommendation of disbarment. He claims that the Board erred in finding that he committed criminal

theft and fraud and other acts of dishonesty," but if the court "disagrees," "he should not be disbarred" under either *In re Slattery* or *In re Gil*; and that if the court determines that the only violations are those relating to the California litigation, " a brief suspension is the appropriate sanction." In contrast, both Bar Counsel and the Board recommend disbarment as the appropriate sanction; and the Hearing Committee, based primarily on the Rule 8.4 (c) violation, recommend a three-year suspension with a fitness requirement for reinstatement. Notably, the Board asserts, "even if the [c]ourt were to find that [Mr. Pelkey] had not engaged in intentional misappropriation of entrusted funds, our recommended sanction would be disbarment."

"A recommendation of the Board with respect to a proposed sanction comes to this court with a strong presumption in favor of its imposition." 29

29 *In re Slaughter,* supra note 17, 929 A.2d at 446 (citing *In re Goffe*, 641 A.2d 458, 463 (D.C. 1994) (per curiam)).

However, we take into consideration several factors, including, but not limited to:

> (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the

> conduct involved dishonesty and/or misrepresentation; (4) the presence or absence of violations of other provisions of the disciplinary rules[;] (5) whether the attorney had a previous disciplinary history; (6) whether or not the attorney acknowledged his or her wrongful conduct; and (7) circumstances in mitigation of the misconduct.[30]

30 *In re Thyden*, 877 A.2d 129, 144 (D.C. 2005) (citations omitted).

"Generally speaking, if the Board's recommended sanction falls within a wide range of acceptable outcomes, it will be adopted and imposed." 31 But, "[i]n the final analysis, it is the court which decides the sanction to be imposed."32

31 *In re Slaughter, supra* note 17, 929 A.2d at 446 (citing *In re Goffe, supra* note 29, 641 A.2d at 463-64).

32 *In re Elgin, supra* note 10, 918 A.2d at 376 (citing *In re Temple*, 629 A.2d 1203, 1207 (D.C. 1993)).

We have imposed the sanction of disbarment in two types of dishonesty cases – (1) intentional or reckless misappropriation where the presumptive

sanction is disbarment,33 and (2) dishonesty "of the flagrant kind."34 Related to the second category are two cases, (a) one in which we described the respondent's misconduct as "grave enough to require disbarment" due to violations of Rules 8.4 (b) and (c), and where the Board had recommended disbarment for "criminal conduct and 'extremely serious acts of dishonesty'"; 35 and (b) the other in which the attorney was "in a position of trust," (although not an attorney-client relationship) and took "fiduciary funds" for his own "personal use,"36 and we imposed disbarment due to violations of Rules 8.4 (b) and (c).37

33 See *In re Cloud*, 939 A.2d 653, 660 (D.C. 2007), as amended 2008 D.C. App. LEXIS 284 (D.C. March 13, 2008) ("When the evidence shows intentional or reckless misappropriation, disbarment is the appropriate sanction in nearly all cases, unless there are extraordinary circumstances that justify a lesser sanction.") (quoting *In re Dixon*, 763 A.2d 730, 732 (D.C. 2000) (internal quotation marks omitted) and citing *In re Adams*, 579 A.2d190, 191 (D.C. 1990) (en banc)).

34 *In re Pennington*, 921 A.2d 135, 142 (D.C. 2007). We discussed two cases that fell into the flagrant dishonesty category, *In re Goffe*, 641 A.2d 458 (D.C. 1994) and *In re Corizzi*, 803 A.2d 438 (D.C. 2002).

35 *In re Gil, supra* note 19, 656 A.2d at 303, 304.

36 *In re Slattery, supra* note 17, 767 A.2d at 216.

37 In *Slattery,* the Board recommended a three-year suspension with a requirement of fitness for reinstatement, and Bar Counsel advocated disbarment.

Our consideration of the factors which we apply to determine the appropriate sanction leads us to accept the Board's recommendation that the appropriate sanction in this case is disbarment. We accept the Board's recommendation because of Mr. Pelkey's (1) persistent, protracted, and extremely serious and flagrant acts of dishonesty (witnessed by the arbitrator, the hearing committee, and the California State Court of Appeal, and detailed herein); (2) his criminal conduct which amounts to theft as he sought to deprive Ms. Cavalli (with whom he also had a personal/romantic relationship that he denied) of any of the benefits of her labor and investments in the Pelkey/Cavalli business ventures by taking and controlling the monetary fruits of the ventures for his own personal use; as well as (3) his unconscionable actions in the courts, especially the California courts. Although Mr. Pelkey's dishonesty

differs in some respects, we believe that it is akin to the seriousness of the dishonesty which prompted us to disbar the respondents in *Gil* (who took and used over $60,000 of a friend's money), *Slattery* (who, despite his position of trust, took over $10,000 from the bank account of a fraternal organization), and *Goffe* (whose behavior manifested repeated dishonesty and fabrication of evidence over an extended period of time). While Mr. Pelkey's behavior is not as egregious as that of the respondent in *Corizzi,* it does "reflect[] a continuing and pervasive indifference to the obligations of honesty in the judicial system,"38 as well as in the disciplinary system, and in his business relationships with Ms. Cavalli which placed him in a position of trust.

38 *In re Corizzi, supra* note 34, 803 A.2d at 443.

Mr. Pelkey has not been subjected to prior discipline, but we agree with the Board that "this factor [does not] materially impact[] the sanction appropriate for the course of misconduct engaged in by [him] over several years." Mr. Pelkey's behavior forced Ms. Cavalli to take legal and administrative action and to defend herself against his unwarranted, dishonest, and unscrupulous administrative and judicial actions. The arbitrator's award to Ms. Cavalli of around $300,000, the

California courts' award of attorney's fees to her, and the California Court of Appeal's monetary sanction against Mr. Pelkey (payable to her) all underscore the seriousness of his misconduct. Furthermore, Mr. Pelkey's lack of remorse has been evident throughout the disciplinary proceeding and, despite the overwhelming evidence against him, he continues to resist acknowledging his wrongful and unethical conduct.

Accordingly, for the foregoing reasons, it is ORDERED that respondent Bruce A. Pelkey is disbarred from the practice of law in the District of Columbia, effective thirty days from the date of this opinion; and it is FURTHER ORDERED that his reinstatement is conditioned upon making full restitution to the Clients' Security Fund with interest at the legal rate of 6% and satisfying all outstanding judgments against him in favor of Linda Cavalli or the related business entities.

So ordered.

Appendix C

SUPREME COURT OF ARIZONA

Arizona Supreme Court No. SB-09-0083-D,
Disciplinary Commission No. 09-4000

In the Matter of a Disbarred Member of the State Bar of Arizona, BRUCE A. PELKEY, Attorney No. 7210 Respondent.

FILED 10/22/2009

O R D E R

On October 5, 2009, respondent filed a Motion to Amend and Request for Stay of Judgment and Order. Upon consideration, IT IS ORDERED denying the motion to amend and request for stay.

DATED this _____ day of October, 2009.

REBECCA WHITE BERCH
Chief Justice

TO: Steve Little
Leticia V D'Amore
Sandra Montoya
Bruce A Pelkey

Appendix D

[State Bar of Arizona Logo]

Loren J. Braud
Direct Dial:
602-340-7276

May 9, 2003

Mr. Bruce A. Pelkey
Consulting Group International, L.L.C.
11661 San Vicente Boulevard, Suite 511
Los Angeles, CA 90049-5113

RE: File No. 03-0192
Linda Cavalli, Complainant

Dear Mr. Pelkey:

The State Bar recently received a complaint or letter of inquiry about you from the above-named individual. A copy of the submission is enclosed.

We reviewed the submission and determined that an investigation is unwarranted in this matter. It may, however, have been referred to another State Bar program, such as fee arbitration or peer review.

This letter simply informs you that we received the information. No response is necessary, but should

you choose to submit a response, it will be placed in the file. Under Rule 61(a)(4), Ariz.R.S.Ct., the record in this matter is public. However, the complaining party's submission will have no adverse impact on your standing with the State Bar.

Sincerely,
/s/
Loren J. Braud
Deputy Chief Bar Counsel

Enclosure

111 W. Monroe, Suite 1800 Phoenix, AZ 85003-1742
Phone 602-252-4804 Facsimile 602-271-4930
www.azbar.org

Appendix E

17A A.R.S. SUP.CT. RULES, Rule 51(b)

(b) Powers and Duties of Bar Counsel. Bar counsel shall:

1. Investigate all information coming to the attention of the state bar which, if true, would be grounds for discipline or transfer to disability inactive status. Bar counsel may request one or more staff examiners to aid them or volunteer bar counsel in conducting investigations. Staff examiners shall work under the supervision of staff bar counsel. Staff examiners may be, but need not be, members of the state bar and may be selected from the regular employees of the state bar.

2. Recommend dispositions prior to formal proceedings, and, if deemed advisable, recommend any discipline in formal proceedings.

3. Promptly notify the complainant and respondent of the disposition of each matter.

4. Represent the state bar in and prosecute discipline and reinstatement proceedings and proceedings for transfer to or from disability inactive status before hearing officers, the commission and

this court, and prosecute contempt proceedings in the appropriate forum.

5. In appropriate cases dismiss proceedings if, after conducting a screening investigation, there is no probable cause to believe misconduct or incapacity exists pursuant to these rules.

6. Monitor and supervise respondents during a probationary or diversionary term, report material violations of the terms of probation or diversion to the imposing entity, and prepare and forward a report to the imposing entity regarding respondent's completion or non-completion of the imposed terms.

7. Monitor and supervise conditional admittees during the conditional admission period, pursuant to Rule 36(a)(4)(F)(6).

17A A.R.S. SUP.CT.RULES, Rule 53(i)

Grounds for discipline of members and non-members include the following:

. . .

(i) Discipline Imposed in Another Jurisdiction; Reciprocal Discipline.

1. Duty to Obtain Order of Discipline from Another Jurisdiction. Upon being disciplined in another jurisdiction, a lawyer admitted to practice in the State of Arizona, whether active, inactive or retired, shall, within thirty (30) days of service of the notice of imposition of discipline from the other jurisdiction, inform the disciplinary clerk of such action, and identify every court in which the lawyer is or has been admitted to practice. Upon notification that a lawyer subject to the jurisdiction of this court has been disciplined in another jurisdiction, the disciplinary clerk shall obtain a certified copy of the disciplinary order and file it with the commission.

2. Notice Served Upon Respondent. Upon receipt of a certified copy of an order demonstrating that a lawyer admitted to practice in the State of Arizona has been disciplined in another jurisdiction, the commission shall issue a notice to the lawyer and to bar counsel containing:

A. A copy of the order from the other jurisdiction; and

B. An order directing that the lawyer or bar counsel inform the commission, within thirty (30) days from service of the notice, of any claim by the lawyer or bar counsel predicated upon the grounds set forth in the next paragraph that the imposition of identical

or substantially similar discipline in this state would be unwarranted and the reasons therefor.

3. Discipline to Be Imposed. Upon the expiration of thirty (30) days from service of the notice pursuant to the provisions above, the commission shall impose or recommend the identical or substantially similar discipline, unless bar counsel or respondent establishes by a preponderance of the evidence, through affidavits or documentary evidence, or as a matter of law by reference to applicable legal authority, or the commission finds on the face of the record from which the discipline is predicated, it clearly appears that:

A. The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

B. There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the commission could not, consistent with its duty, accept as final the other jurisdiction's conclusion on that subject; or

C. The imposition of the same discipline would result in grave injustice; or

D. The misconduct established warrants substantially different discipline in this state.

4. Alternative Discipline. If the commission determines that any of the above listed elements exist, it may:

A. Direct that a complaint be filed,

B. Impose or recommend suitable discipline to the court, or

C. Dismiss the matter.

The decision of the commission shall be reviewed by the court as provided for in other discipline matters.

5. Conclusiveness of Adjudication in Other Jurisdiction. In all other respects, a final adjudication in another jurisdiction that a lawyer has been found guilty of misconduct shall establish conclusively the misconduct for purposes of a discipline proceeding in this state.

17A A.R.S. SUP.CT.RULES, Rule 54(a) and (b)

(a) Generally. A discipline proceeding commences upon receipt by the state bar of a charge against a respondent. A discipline proceeding, and a complaint if one is filed, shall be disposed of by:

1. Dismissal;

2. Stay of discipline proceeding pending a disability proceeding; or

3. Imposition of one or more sanctions as provided in these rules.

(b) Initial Proceedings. Upon the commencement of a discipline proceeding against a respondent, the matter shall first proceed as provided in this section:

1. *Screening.* The state bar shall evaluate all information coming to its attention by charge or otherwise alleging lack of professionalism, misconduct or incapacity. The state bar:

A. Shall refer the information to the appropriate entity in the jurisdiction in which the lawyer is admitted if the lawyer or other person is not subject to the jurisdiction of the court;

B. Shall close the matter if the allegations would not constitute misconduct or incapacity under these rules, even if found to be true;

C. May refer the matter to mediation or diversion or take other appropriate action without conducting a full screening investigation where the facts asserted in the charge, if true, indicate a violation of these rules that does not involve deceit, dishonesty or actual harm to a client. The respondent has the right

to reject referral of the matter to mediation or diversion and may demand a full screening investigation and a probable cause determination pursuant to Rule 54(b)(4); or

D. Shall conduct a screening investigation if the lawyer is subject to the jurisdiction of the court and the information alleges facts which, if true, would constitute misconduct or incapacity.

E. May refer for fee arbitration any charge that, in the state bar's opinion, primarily involves a fee dispute, provided both the respondent and complainant agree to participate in fee arbitration.

2. *Investigation and Recommendation.* All investigations shall be conducted or supervised by bar counsel. Following a screening investigation, the state bar may recommend one or more of the following: dismissal, diversion, a stay, informal reprimand, probation, restitution, assessment of costs and expenses, or the filing of a complaint, or a petition for transfer to disability inactive status or, with the consent of the respondent, any other sanction. No disposition adverse to the respondent shall be recommended by the state bar until the respondent has been afforded an opportunity to respond in writing to the charge.

3. *Dismissal by the State Bar.* After conducting a screening investigation, if there is no probable cause

to believe that misconduct or incapacity under these rules exists, the state bar counsel shall dismiss a discipline proceeding by filing a notice of dismissal with the Records Manager of the Lawyer Regulation Office of the state bar.

4. *Probable Cause Review.* Any recommendation by the state bar for a disposition other than dismissal shall be reviewed by the panelist or the panelist's designee. The panelist or designee may approve, disapprove or modify the recommendation and shall file the decision with the Records Manager of the Lawyer Regulation Office of the state bar. The state bar counsel may appeal a decision to disapprove or modify its recommendation to an appeal panel composed of three members of the board of governors, who shall either approve bar's recommendation, approve the action of the panelist, or require any other action that could have been recommended by the state bar.

5. *Disposition Prior to Formal Complaint.*

A. Subject to the terms of this subsection, a decision of the panelist, or in the event of an appeal by the state bar, a decision of the appeal panel, shall be final with respect to dismissal, diversion, stay, informal reprimand, assessment of costs and expenses, probation, restitution, and the filing of formal discipline or disability proceedings. Orders of diversion, stay, informal reprimand, probation,

restitution, and assessment of costs and expenses shall be signed by the panelist or appeal panel.

B. Within ten (10) days of service of an order of diversion, stay, probation, restitution, or assessment of costs and expenses entered by a panelist or an appeal panel, respondent has the right to appeal pursuant to subsection (c) of this rule. Within ten (10) days of service of an order of informal reprimand entered by a panelist or an appeal panel, respondent has the right to demand that a formal proceeding be instituted, whereupon such order shall be vacated and the matter disposed of in the same manner as any other matter instituted before a hearing officer.

C. A recommendation of any sanction that is consented to by respondent, pursuant to Rule 56, before or while the matter is pending before the panelist, other than those made final by decision of the panelist or appeal panel, shall be submitted directly to a hearing officer for review.

6. *Referral to Peer Review Committee, Fee Arbitration, or Mediation.* The state bar may refer a matter to the peer review committee, the fee arbitration committee, or to mediation after dismissal of a charge.

7. *Dismissal Upon Agreement in Mediation.* The probable cause panelist shall enter an order

dismissing discipline proceedings following an agreement reached in mediation by respondent and complainant.

17A A.R.S. SUP.CT.RULES, Rule 58

(a) Review By the Commission. The recommendations of a hearing officer shall proceed before the commission for review if the recommended sanction or portion thereof includes disbarment, suspension or censure, or in the case of an appeal, upon filing a notice of appeal. Briefs will be filed in accordance with this rule and evidence not presented to the hearing officer shall not be presented to the commission.

(b) Standard of Review. The commission reviews questions of law de novo. In reviewing findings of fact made by a hearing officer, the commission shall apply a clearly erroneous standard. In matters over which the commission has original jurisdiction, it may decide factual matters.

(c) Form of Pleadings. All pleadings or briefs filed before the commission should be captioned BEFORE

THE DISCIPLINARY COMMISSION as set forth below:

BEFORE THE DISCIPLINARY COMMISSION

In the Matter of a Member	)
of the State Bar of Arizona,	)
(Name)	)
Bar No. 000000	)

(d) Briefs.

1. *Time for Filing*. In cases in which one of the parties has filed a notice of appeal, the party filing the notice may file an opening brief within twenty (20) days after filing the notice of appeal. Within ten (10) days after the filing of the opening brief, the other party may file an answering brief. If both parties file notices of appeal, both parties may file opening briefs within twenty (20) days of the filing of the notices of appeal. Within ten (10)days after the filing of opening briefs, the parties may file answering briefs. If neither party files an appeal, the commission may request the submission of briefs or

any party may request leave to file a brief. Nothing further may be filed without leave of the commission through its chair. Evidence not presented to the hearing officer shall not be presented to the commission.

2. *Form of Brief.* Opening and answering briefs shall comply with the provisions of Rules 6(c) and 14(a)(1) and (b), Ariz. R. Civ. App. P., unless leave is granted by the commission chair upon a showing of good cause. Appendices may contain excerpts from the transcript of the hearings, pleadings, orders, and authority that counsel wishes to bring to the attention of the commission but shall not contain arguments of law or fact properly included in the body of the brief. If the party appeals an order modifying or rejecting an agreement, a copy of the tender of admissions and joint memorandum shall be included in the appendix.

3. *Oral Argument.* Unless the commission orders otherwise, a party desiring oral argument shall request it no later than the expiration of the time for filing a notice of appeal.

(e) Commission Report. Within thirty (30) days after oral argument or consideration of the matter in executive session, the commission shall prepare and file a written report, affirming, reversing or modifying the findings of fact, conclusions of law or recommendation(s) before it, remanding the matter

for further proceedings before the hearing officer, or dismissing the charge or complaint. If the report cannot be timely filed, the commission may file with the clerk of the supreme court an original notice and six copies stating the reasons for the delay. The notice must state the date by which the report will be filed. The commission shall submit a copy of the notice to respondent, respondent's counsel, if any, and bar counsel of record. A copy of the commission report and any order shall be served upon the hearing officer from which referred, respondent, respondent's counsel, if any, and bar counsel of record. The decision of the commission shall be final as to dismissal, diversion, remand, probation, reprimand, restitution, assessment, and a censure that is not reviewed by the court, if not part of a sanction which includes disbarment or suspension.

(f) Commission Recommendation for Disbarment; Interim Suspension. Upon a recommendation by the commission that respondent be disbarred, the state bar may file a motion with the court for interim suspension of the respondent for the remainder of the proceedings, not in excess of five (5) years, pending further order of this court. Suspension under this subsection shall occur unless the respondent makes an affirmative showing that the respondent's continuation of the practice of law will not be detrimental to the integrity and standing of the state bar and the administration of justice, or

be contrary to the public interest. If discretionary review of the decision of the commission is not sought and the decision becomes final, such motion need not be filed, or if filed may be withdrawn.

1. *Motion.* The motion for interim suspension shall set forth the acts of the respondent believed to constitute grounds for such suspension, as set forth above, and must include a copy of the commission report. The motion may be supported by documents or affidavits. The motion and any attachments will be filed with the court and copies provided to the disciplinary clerk. A copy of the motion shall be personally served upon respondent.

2. *Show Cause Order.* Upon filing of the motion, an order to show cause signed by a justice of this court shall issue requiring respondent to appear before the court on such date and time as the justice may set to show cause why the motion should not be granted. A copy of the order to show cause shall be personally served upon the respondent at least ten (10) days before the scheduled hearing.

3. *Response to Motion.* The respondent may respond to the motion and the response may be supported by documents or affidavits. The response and any attachments shall be filed with the court and copies provided to the disciplinary clerk and served upon bar counsel of record at least three (3) days before the scheduled show cause hearing. Failure to

respond shall not result in default or waive respondent's right to appear at the show cause hearing.

4. *Application of Other Rules.* If the court enters an order suspending the lawyer, the provisions of Rule 72 relating to suspended lawyers shall apply.

17A A.R.S. SUP.CT.RULES, Rule 59(a), (d), (e), (g) and (h)

(a) Petitions for Review. Within ten (10) days after service of a commission report recommending censure, suspension, disbarment, reinstatement or denial of reinstatement, respondent or the state bar may file with the disciplinary clerk a notice of intent to file a petition for review by the court. The petition for review is due twenty (20) days thereafter. A cross-petition for review may be filed within fifteen (15) days after service of a petition for review. An original and eight (8) copies of the petition for review and cross-petition for review shall be filed with the disciplinary clerk.

. . .

(d) Form and Contents of Petition. The form of a petition or cross- petition for review shall comply with Rule 6(c), Ariz. R.C.A.P. It shall not exceed twenty (20) pages, exclusive of the appendix, and shall contain the following:

1. A synopsis of the commission decision, in addition to a copy of the decision, that shall be attached to the petition.

2. The issues which were decided by the commission and which the petitioner wishes to present to the court for review. The petitioner shall also list, separately and without argument, those additional issues which were presented to, but not decided by, the commission and which may need to be decided if review is granted.

3. The facts material to a consideration of the issues presented to the court for review.

4. The reasons why the petition should be granted.

All references to the record shall be supported by an appendix, with appropriate copies of the portions of the record which support the petition. The petition shall not incorporate any document by reference, except the appendices. If the appendices, exclusive of the copy of the commission decision, exceed fifteen (15) pages in length, such appendices shall be

fastened together separately from the petition and the copy of the commission decision.

(e) Transmittal of Partial Record Upon Filing of Petition for Review. Upon the expiration of the time for filing a cross-petition for review, the disciplinary clerk shall transmit to the clerk of the court a partial record of the case consisting of the original and six (6) copies of the petition or cross-petition for review and seven (7) copies of the commission decision.

. . .

(g) Order Granting Review. If the court grants review, its order shall specify the issue or issues which are to be reviewed. The court may order that the parties file additional briefs or that oral argument be heard, or both. If the order granting review does not provide for supplementation of briefs or for oral argument, either party may, within fifteen (15) days after the clerk mails notice of the court's order, request the court to do so by a motion specifying the reasons for supplementation or for oral argument.

(h) Transmittal of Remaining Record. Upon notification by the clerk of the court that a petition or cross-petition for review has been granted, the disciplinary clerk shall transmit the remaining record to the court.

Appendix F

Reciprocal Discipline Table

State	Citation to Rule	Hearing by State Supreme Court	Mandatory Review of Record by Court
Alaska	ALASKA BAR R. 27	Not specified	Yes; applies *Selling* standards
Arizona	Rules 53(i), 59(g), ARIZ. R. SUP. CT.	Only on grant of Petition For Review	No
California	STATE BAR CT. Rule 1330	Hearing before State Bar Appeals Court; discretionary review by Court	Not specified

State	Citation to Rule	Hearing by State Supreme Court	Mandatory Review of Record by Court
Connecticut	CONN. PRAC. BK. § 2-39	Yes	Yes
D.C.	BOARD ON PROF. RES. Rule 8.3; RULES GOVERNING BAR, Rule XI §11	Yes, before Board; review of record by Court of Appeals	Yes; applies *Selling* standards
Florida	Florida Rules of Discipline, Rule 3-7.2	Referred for hearing before a referee	Yes; proceeds as in original disciplinary proceedings
Hawaii	SUP. CT. Rule 2.15	Not specified	Yes; applies *Selling*
Idaho	Idaho Bar Comm. Rules 511, 513	Hearing before committee; discretionary oral	Hearing Committee applies partial *Selling*

State	Citation to Rule	Hearing by State Supreme Court	Mandatory Review of Record by Court
		argument on appeal	standards
Massachusetts	RULES OF SUP. JUD. CT., Rule 4:01 §16	Yes	Yes; applies *Selling* standards
Michigan	Michigan Court Rule 9.104	Hearing before panel; then same procedures as in nonjury civil action	Yes; applies partial *Selling* standards
Nebraska	SUP. CT. Rule §3-321	Not specified – *see In re Dineen*	Yes – per *Dineen*
Nevada	SUP. CT. Rule 114	Not specified	Yes; applies *Selling* standards

State	Citation to Rule	Hearing by State Supreme Court	Mandatory Review of Record by Court
New York	N.Y. COMP. CODES R. & REG. tit. 22, §603.3(b)	Yes	Yes; applies *Selling* standards
Ohio	SUP. CT. R. FOR GOVERNING BAR § 11(F)	Not specified	Yes; applies *Selling* standards
Oregon	Oregon State Bar R. of Proc. 3.5, 10.5, 10.6	Discretionary after review, with possible evidentiary hearing	Yes; applies partial *Selling* standards; de novo review after evidentiary hearing
Pennsylvania	Pa. R. of Disc. Enf., Rule 216	Not specified	Yes; applies *Selling* standards

State	Citation to Rule	Hearing by State Supreme Court	Mandatory Review of Record by Court
South Dakota	S.D. CODIFIED LAWS, §§16-19-71 through 74	Not specified – but see *In Re Rokahr*	Yes; applies *Selling* standards
Texas	Texas R. of Disc. Proc., Rules 7.11, 9.01	Yes, following review by Bd. of Disc. App.	Yes, after Board applies *Selling* standards
Virginia	VA. SUP. CT. R., Rule 6:4-13-24	Hearing before Bar Disc. Bd.; appeal to Sup. Ct.	Board applies *Selling* standards
Washington	Rules Enf. Lawyer Cond, ELC 9.2	Not specified	Yes; applies *Selling* standards